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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHROGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, and ROGER T. ERICKSON,

Petitioners

v.

THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, ASSEMBLY OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,

and

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROGER ALLAN MOORE *
E. MARK BRADEN
MICHAEL A. HESS
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

JAMES R. PARRINELLO
MARGUERITE MARY LEONI
NIELSEN, HODGSON,
PARRINELLO & MUELLER
Suite 2650
650 California Street
San Francisco, CA 94108

* Counsel of Record

Attorneys for Petitioners

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QUESTION PRESENTED

The California Legislature, which had substantial Democratic majorities in both its houses, enacted a statute dividing the state into congressional districts in a way that petitioners, active California Republicans, assert constitutes an egregious gerrymander, diluting the force of their votes by impairing the ability of Republicans to obtain fair representation in Congress. Petitioners promptly filed an action in a United States district court challenging the redistricting on federal constitutional grounds and raising in addition pendent state law claims. The three-judge district court decided to abstain from adjudicating petitioners' complaint pending resolution of the state law claims in a state court. After the affirmance of that decision by the court of appeals, petitioners presented their state law claims to the California Supreme Court, which declined to hear them. Petitioners then filed an amended complaint in the federal court deleting the state law claims. Upon petitioners' request to reassert jurisdiction, the district court, affirmed again by the court of appeals, nevertheless continued its abstention.

Under these circumstances, the question presented is the lawfulness of the three-judge district court's abstention from its duty of adjudicating claims properly brought before it, which for nearly two years—through an entire congressional election cycle—has prevented petitioners from obtaining a decision on their substantial claim of an unconstitutional impairment of their voting rights by means of a gross political gerrymander.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. A two-year abstention from deciding the important voting rights issue of political gerrymandering is contrary to the decisions of this Court	10
II. Abstention is improper as federal law controls congressional redistricting cases	14
III. Continuing abstention after the California Supreme Court refused to hear the case conflicts with decisions in other circuits	17
CONCLUSION	23
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Assembly v. *Deukmejian*, 30 Cal. 3d 638 (1982), *appeal dismissed and cert. denied sub nom. Republican National Committee* v. *Burton*, 102 S.Ct. 2003 (1982) 3, 18
Baggett v. Bullitt, 377 U.S. 360 (1964) 12, 21
Bandemer v. *Davis*, Nos. IP 82-56-C, IP 82-164-C (S.D. Ind. Dec. 13, 1984) (*Notice of appeal to Supreme Court filed* Jan. 11, 1985) ..... *passim*
Brown v. *Superior Court*, 5 Cal. 3d 509 (1972) 18
Busbee v. *Smith*, 549 F.Supp. 494 (D.D.C. 1982) 16
Carstens v. *Lamm*, 543 F.Supp. 68 (D.Colo. 1982) 15
Clem v. *Haben*, —— F.Supp. —— (N.D. Fla. 1982) 16
Doph v. *Munro*, —— F.Supp. —— (N.D. Wash. 1982) 16
Dublin v. *White*, 528 F.Supp. 1323 (E.D. Ark. 1982) 16
Duncan v. *Poythress*, 657 F.2d 691 (5th Cir. 1981) 13
Farley v. *Healey*, 67 Cal.2d 325 (1967) 18
Flanagan v. *Gillmor*, —— F.Supp. —— (S.D. Ohio 1982) 16
Flateau v. *Anderson*, 537 F.Supp. 257 (S.D. N.Y. 1982) 15
414 Theater Corp. v. *Murphy*, 499 F.2d 1155 (2d Cir. 1974) 21
Gomillion v. *Lightfoot*, 364 U.S. 339 (1964) 10
Goddard v. *Babbitt*, 536 F.Supp. 538 (D.Ariz. 1982) 16
Griffin v. *School Board*, 377 U.S. 218 (1964) 13
Harman v. *Forssenius*, 380 U.S. 528 (1965) 12, 13
In re Illinois Congressional District Reapportionment Cases, —— F.Supp. —— (N.D.Ill. 1982), *aff'd sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982) 15
In re Pennsylvania Congressional District Reapportionment Cases, 535 F.Supp. 191, 567 F.Supp. 1507 (E.D. Penn. 1982) 15

TABLE OF AUTHORITIES—Continued

Page

Jordan v. *Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982) 16
Karcher v. *Daggett*, 103 S.Ct. 2653 (1983) ..... *passim*
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 14
LaComb v. *Growe*, 541 F.Supp. 145 & 160 (D.Minn. 1982), *aff'd sub nom. Orwoll* v. *LaComb*, 456 U.S. 966 (1982) 16
Legislature v. *Reinecke*, 6 Cal. 3d 595 (1972) 18
Legislature v. *Reinecke*, 10 Cal. 3d 396 (1973) 18
Lister v. *Lucey*, 575 F.2d 1325 (7th Cir. 1978) 20, 21
Major v. *Treen*, 574 F.Supp. 325 (E.D. La. 1983) .. 15
McNeese v. *Board of Education*, 373 U.S. 668 (1963) 14
NAACP v. *Gallion*, 368 U.S. 16 (1961) 21
National Audubon Society v. *Superior Court*, 33 Cal. 3d 419 (1983) 19
O'Sullivan v. *Brier*, 540 F.Supp. 1200 (D.Kan. 1982) 16
Railroad Commission v. *Pullman Co.*, 312 U.S. 496 (1941) ..... *passim*
Reynolds v. *Sims*, 377 U.S. 533 (1964) 12, 16
Ryan v. *State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir. 1981) 15
Seamon v. *Upham*, 536 F.Supp. 931 (E.D. Tex. 1982), *vacated sub nom. Upham* v. *Seamon*, 456 U.S. 37, *reh. denied*, 456 U.S. 938 (1982) 16
Scott v. *Germano*, 381 U.S. 407 (1965) 20
Shayer v. *Kirkpatrick*, 541 F.Supp. 922 (W.D. Mo. 1982), *aff'd sub nom. Schatzle* v. *Kirkpatrick*, 456 U.S. 966 (1982) 16
Silver v. *Brown*, 63 Cal.2d 316 & 841 (1965) 18
South Carolina State Conference of Branches of the NAACP, Inc. v. *Riley*, 533 F.Supp. 1178 (D.S.C. 1982), *appeal dismissed*, 459 U.S. 1026 (1982) 16
State AFL-CIO v. *Elections Board*, 543 F.Supp. 630 (E.D. Wis. 1982) 16
Travis v. *King*, 552 F.Supp. 554 (D.Hawaii 1982) .. 16
Wenke v. *Hitchcock*, 6 Cal. 3d 746 (1972) 18

TABLE OF AUTHORITIES—Continued

	Page
Wesberry v. *Sanders*, 376 U.S. 1 (1964)	12, 14
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886)	12
Zwickler v. *Koota*, 389 U.S. 241 (1967)	12
CONSTITUTIONAL PROVISIONS	
U.S. Const. Article I, § 2	2, 7, 17
U.S. Const. Amendment I	8, 12, 17
U.S. Const. Amendment XIV	7, 17
Calif. Const. Article II, § 10(a)	3
Calif. Const. Article IV, § 8(b)	4
Calif. Const. Article IV, § 8(c)	5
STATUTES	
United States Code	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2284	5
CALIFORNIA STATUTES	
A.B. 2X, 1st Extraordinary Sess. (1983-84), Chap. 6, 1983 Stats.	*passim*
A.B. 5X, 1st Extraordinary Sess. (1983-84)	4
A.B. 301, 1981 Legislature, Chap. 535, 1981 Stats.	3
RULES	
Rules of the Supreme Court of the United States, Rule 17(1)(a)	22
OTHER REFERENCES	
Congressional Quarterly; *State Politics and Redistricting* (1982)	10
Wall St. J., Nov. 26, 1984, Editorial, *The National Gerrymander*	11
Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket*, 1 J.L. & Pol. 357 (1984)	16

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Congressman Robert E. Badham, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 1, 1984.

OPINIONS BELOW

The memorandum opinion of the court of appeals, which by order of that court will not be reported, is set forth at pages 1a-3a of the Appendix to this petition. The opinion of the district court, dated June 19, 1984, is not yet reported. It is set forth at pages 4a-15a of the Appendix, along with a dissenting opinion at pages 16a-20a. The Appendix also includes an earlier, related order of the court of appeals in this case, dated December 12, 1983 (pp. 23a-24a), and a September 26, 1983 opinion (pp. 27a-35a), reported at 721 F.2d 1170; an opinion of the district court, dated June 20, 1983 (pp. 36a-45a), reported at 568 F. Supp. 156; and an order of the Supreme Court of the State of California, dated October 27, 1983 (pp. 25a-26a).

JURISDICTION

The most recent judgment of the Court of Appeals for the Ninth Circuit was entered on November 1, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under: (a) Article I, Section 2, of the Constitution of the United States which provides in pertinent part, that Members of the United States House of Representatives be chosen "by the People of the several states," (b) Section 1 of the Fourteenth Amendment of the Constitution of the United States which provides in pertinent part: "No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . ," and (c) The First Amendment of the Constitution of the United States which states in pertinent part: "Congress shall make no

law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances . . . ."

STATEMENT OF THE CASE

In the fall of 1981, following the decennial census of 1980, the California Legislature enacted a statute redistricting the state[1] into 45 congressional districts, which was two more districts than California was apportioned in the 1970s. Members of the Democratic Party controlled both houses of the legislature and the governorship. An outcry quickly arose over the congressional districts because they appeared to be, and were cynically acknowledged to be, a blatant political gerrymander. Over one million signatures were collected to subject the congressional redistricting law to a referendum of the voters.[2] In June 1982, despite a Democratic majority in voter registration, the voters overwhelmingly disapproved and thereby invalidated the redistricting scheme. Though the Supreme Court of California directed that the 1982 congressional elections be conducted on the basis of the plan the voters had disapproved, the legislature had to enact a new plan for the 1984 elections.

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[1] Assembly Bill 301 (A.B. 301), 1981 Legislature, Chap. 535, 1981 Stats.

[2] This automatically prevented A.B. 301 from going into effect. Calif. Const. Article II, § 10(a). When it became clear that enough citizens had signed the petitions to qualify the referendum for the ballot, the Assembly, Senate Democrats, and the Democratic congressional delegation filed original petitions for mandate with the Supreme Court of California seeking to block the referendum election and/or to obtain an order mandating the use of the A.B. 301 districts on an interim basis for the 1982 elections, regardless of the outcome of the referendum. A bitterly divided court granted the latter request and ordered A.B. 301 districts to be used in the 1982 congressional election. *Assembly* v. *Deukmejian*, 30 Cal.3d 638 (1982).

The legislature paid little formal attention to the issue of congressional redistricting until, in the election of November 1982, a Republican was elected Governor. With less than 60 days remaining in his term of office, Democratic Governor Edmund G. Brown, Jr., called the legislature into special session beginning on December 6, 1982. On that day, a skeletal congressional redistricting bill (simply a "vehicle" bill without any substance), Assembly Bill 5X (A.B. 5X), was introduced in the Assembly, the lower house of the legislature. No hearings were held on this bill, and no delineations of district lines were placed in the bill until December 27, 1982, when these were added by amendment on the Assembly floor.

One day later, the bill passed the Assembly on a party-line vote of 41 to 29. Because of a California constitutional requirement (Calif. Const. Art. IV, Section 8(b)) that a bill be read on three separate days prior to final passage, A.B. 5X could not be approved by the California Senate in time to be signed by the lame duck Governor in his last hours in office. In order to get a bill on the desk of the outgoing Governor, the Senate majority requested that, on the morning of December 29, 1982, another bill, Assembly Bill 2X (A.B. 2X) (which redrew the districts of State Board of Equalization members, a totally separate issue), be removed from Governor Brown's desk and returned to the Senate. A.B. 2X was then amended to include the congressional districts contained in A.B. 5X, as already passed by the Assembly. In neither legislative house were committee hearings held off the subject of congressional redistricting.[3]

On the evening of December 29, the Senate bill passed by a party-line vote of 21 to 10. That same evening, the

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[3] Nor was there time allowed to review the proposed districts, which were described by reference to thousands of census tracts.

Assembly concurred in the Senate amendments, on a strict party-line vote. The margins in the two houses were the two-thirds necessary to add an urgency clause (Calif. Const. Art. IV, Sec. 8(c)), which prevented the enactment from being subjected to another referendum. On January 2, 1983, just a few hours before leaving office, Governor Brown signed A.B. 2X into law.

On March 8, 1983, petitioners (plaintiffs below) filed their complaint against A.B. 2X in the United States District Court for the Northern District of California. Petitioners are members of an identifiable, quantifiable and politically salient group of individuals—registered Republicans and voters who tend to vote for Republican candidates—whose voting strength has been diluted by A.B. 2X. The named defendant was the California Secretary of State, the state's chief elections official, and an elected Democrat. A three-judge court was convened pursuant to 28 U.S.C. § 2284. Shortly thereafter, the Assembly petitioned for and was granted leave to intervene; no Republican members of the Assembly were consulted about, or concurred in, the intervention. The California Democratic congressional delegation also intervened in support of the enactment.

The complaint raised federal equal protection, freedom of association, due process, and "one person, one vote" challenges to A.B. 2X. Also included were several pendent state law claims arising from the haste in which the statute passed the legislature. So hasty, indeed, was the process that "technical corrections" had to be made by the California Secretary of State, resulting in sizable shifts of population from one district to another, to reduce the redistricting plan's population deviations to what could plausibly be argued to be constitutionally acceptable levels. These "corrections" were made without any legislative action and announced publicly after peti-

tioners' complaint was filed. The complaint was then amended to assert the illegality of the "technical corrections" process.[4]

The intervenor Democratic congressional delegation moved for a stay of the federal court proceedings, asking the court to abstain from adjudicating petitioners' complaint pending resolution of the state law issues in a state court. At the same time, the delegation filed suit in the state's most congested trial court, the Superior Court of the County of Los Angeles, asking for a declaration that A.B. 2X was legal and constitutional. Since that date, the delegation has not prosecuted that suit.

On June 20, 1983, the district court issued its order to abstain from deciding the federal issues in this case, upon the rationale of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). The court decided to "abstain until the state law issues are settled by the state court" and "retain jurisdiction to resolve whatever federal issues remain." (P. 45a, *infra.*)[5]

On June 22, 1983, this Court issued its decision in *Karcher* v. *Daggett*, 103 S.Ct. 2653 (1983), striking down New Jersey's congressional redistricting scheme. Petitioners immediately requested the district court to reconsider its decision in light of *Karcher*. The district court denied the petition. (Pp. 34a-35a, *infra.*)

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[4] As passed by the legislature, A.B. 2X contained an overall population deviation of 3.283%, which was reduced to .0538% by the Secretary's changes. (*See* p. 37a, *infra.*)

[5] As will be discussed *infra*, this approach is markedly different from that taken by federal courts nationwide. *See, especially, Bandemer* v. *Davis*, Nos. IP 82-56-C, IP 82-164-C (S.D. Ind. Dec. 13, 1984), the direct appeal of which is pending to this Court. (Notice of appeal filed January 11, 1985.) While *Bandemer* is remarkably similar to this case, the two cases have received remarkably dissimilar treatment by their respective federal courts.

Petitioners appealed to the court of appeals and, as a precaution, also petitioned for a writ of mandamus addressed to the district court's abstention ruling. (*See*, pp. 28a-29a, *infra.*) On September 26, 1983, the Ninth Circuit affirmed the district court's abstention order, but indicated that petitioners could return to that court if the state courts did not act with reasonable speed. (Pp. 27a-35a, *infra.*)

On September 30, 1983, just four days after the court of appeals' decision, petitioners filed a petition for writ of mandate in the Supreme Court of California asking for an expedited hearing and decision of all state law issues in view of the time exigencies caused by the approaching 1984 congressional election deadlines. Although this is a common procedure by which other California redistricting cases have been resolved in the past, the California Supreme Court nonetheless denied the petition on October 27, 1983, without a hearing and, ostensibly, without prejudice to petitioners' seeking relief in an appropriate state court when "the abstention order becomes final." (Pp. 25a-26a, *infra.*)

In light of the California Supreme Court's refusal to act, the failure of the Democratic congressional delegation to prosecute its action in the Superior Court in Los Angeles, and the approaching 1984 election cycle, petitioners, in December 1983, asked the district court to lift its abstention order and reassert jurisdiction. At the same time, they moved for leave to file a second amended complaint. In the second amended complaint, petitioners deleted all pendent state law claims. They objected to A.B. 2X solely on federal constitutional grounds: that the redistricting statute constituted a political gerrymander and thereby violated several of petitioners' constitutional rights—their rights under Article I, Section 2, to play a proper role in the election of their representatives; their rights, under the Fourteenth Amendment, to the equal

protection of the laws; and their rights, under the First Amendment, to associate with others of their political persuasion to advance their political cause.

District Judge Schnacke granted petitioners' motion to file the second amended complaint omitting the pendent state law claims, and thereafter answers to the second amended complaint were filed. The three-judge court scheduled a hearing for April 13, 1984, on all pending motions.

After oral argument, however, the district court denied petitioners' request to lift the abstention. The opinion was written by Circuit Judge Poole, and joined by District Judge Zirpoli (pp. 4a-15a, *infra*), with District Judge Schnacke dissenting (pp. 16a-20a, *infra*). This ruling came more than six months after the motion to reassert jurisdiction was filed, and more than 15 months after petitioners filed their original complaint, precluding any relief for the 1984 congressional elections.

The court was not moved by petitioners' unsuccessful effort to invoke the processes of the California Supreme Court or by their subsequent dropping of the pendent state law claims. It remitted them, effectively, to the glacial processes of the Los Angeles County Superior Court to pursue there, in a lawsuit of others' devising and in a forum of others' selection, claims that petitioners, in their second amended complaint, had manifested their willingness to forgo. In his dissent, Judge Schnacke protested what he termed "a misapplication of the doctrine of abstention" and said that further abstention "poses grave danger to the constitutionally protected right to vote and to have each person's vote be given equal weight." (Pp. 16a-17a, *infra.*)

On a second appeal and precautionary petition for mandamus, the court of appeals, while professing a con-

tinuing "concern about federal voting rights and the need for a timely resolution of this case" (p. 3a, *infra*), sustained the district court's continued abstention because it did not think that petitioners had made an adequate showing that they had effectively pursued their remedies in state court (p. 2a, *infra*).[6]

REASONS FOR GRANTING THE WRIT

Certiorari should issue in this case because the refusal of the courts below to adjudicate substantial claims of impairment of the constitutionally assured right to vote rests on a mistaken application of the principles by which this Court has defined those rare occasions where abstention is permitted; because of the contrast between the decision below and the course followed by another three-judge court in recently deciding the merits of a substantially similar gerrymandering claim in Indiana; because the decision below conflicts with decisions of the Second and Seventh Circuits holding that abstention ought not to continue if the state judiciary declines an opportunity to provide an expeditious adjudication of issues that first prompted an order of abstention; because the decision below effectively precludes petitioners from securing relief for at least one more and perhaps even further congressional election cycles; and because the refusal of the California Supreme Court to apply its usual expeditious procedures for resolving redistricting cases renders unacceptable any further insistence that an initial adjudication be secured from the state judiciary.

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[6] Notwithstanding petitioners' belief that the court of appeals erred in remitting them again to the state courts, on January 18, 1985, petitioners moved for precedence and to advance in the Los Angeles Superior Court action. Petitioners have simultaneously filed this petition with this Court so that some resolution of their claim can be ensured in time for the 1986 or 1988 congressional elections.

I. A TWO-YEAR ABSTENTION FROM DECIDING THE IMPORTANT VOTING RIGHTS ISSUE OF POLITICAL GERRYMANDERING IS CONTRARY TO THE DECISIONS OF THIS COURT

The drafters of the current California congressional districts deliberately constructed a sophisticated and invidious gerrymander of historic proportions, effectively diluting Republican votes in congressional elections throughout the nation's most populous state. The Democratic-controlled legislature used modern computer techniques that make it easy to create equally populous districts without regard to existing political lines or the shape or contiguity of the districts, but with regard to the political affiliations of residents of those districts. This prompted one commentator to suggest that Elbridge Gerry, the governor of Massachusetts who gave his name to the gerrymander, would have to give way to the principal architect of the California creation, who "has made a strong bid to have the entire practice renamed in his honor." [7]

The California gerrymander is unmistakable in its appearance and its effect. Many of the districts created by this statute are "strangely irregular" and "uncouth" in their configuration, *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341, 340 (1964). *See* maps that are included in the Appendix to this petition (pp. 46a-50a, *infra*).[8] The creation of such districts has had the intended effect of ensuring the election of Democrats as is demonstrated by the results of last year's California congressional elections. Democrats were elected to 27 of California's 45 seats—*60% of the seats*—even though Republican congressional candidates *actually received more votes than Democratic candidates* (49.3% Republican to 48.4% Dem-

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[7] *Congressional Quarterly: State Politics and Redistricting*, 145 (1982).

[8] Detailed color maps of the entire plan have been filed with the Clerk of this Court.

ocrat). The gerrymander virtually assures that incumbents will retain their seats through the end of this decade, as is reflected in the overwhelming margins of victory in the 1984 elections. Competitive congressional races have virtually disappeared in California. The 1984 California congressional election results are set out in the Appendix to this petition (p. 52a, *infra*).[9]

The elections that resulted in the highly disproportionate return of Democrats to office were held without the legality of the legislature's second gerrymander having been tested for its constitutionality. The reason is the decision of the district court, affirmed by the court of appeals, that it would abstain from adjudicating petitioners' substantial claim that the gerrymander violated their federal constitutional rights until subsidiary state law issues were heard and decided by a state court.

Petitioners have attempted unsuccessfully to invoke the processes of the highest court of the state to obtain a prompt ruling on the state claims, and, in the wake of the California Supreme Court's declination to act, they have dropped their state claims from the federal court suit. Nonetheless, the district court, sustained by the court of appeals, has continued its abstention, effectively telling petitioners that they must try harder to get a state adjudication. The continued abstention ensures that the congressional elections of 1986 and perhaps even those of 1988, will be held without the gerrymander of the congressional district ever having been tested for its constitutionality.

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[9] This issue is not a limited, state law question affecting California alone, but rather, one that could affect the makeup of the *entire* House of Representatives. Using nearly complete unofficial tabulations, one commentator pointed out that Democratic congressional candidates received 36,615,220 votes in 1984, only slightly more than the Republican vote of 36,576,336. Yet "out of a popular vote margin of a few thousand votes, the Democrats have managed to manufacture a 71-vote majority in the House." Editorial, *The National Gerrymander*, Wall St. J., Nov. 26, 1984, at 2, col. 1.

In its first substantive congressional redistricting case, this Court enunciated the fundamental status of the right to vote. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). The right to vote, accordingly, is "fundamental because [it is] preservative of all rights," *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965), quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). In this case, delay in the vindication of the fundamental right to vote is the denial of that right. The delays tolerated by the courts below "strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).

The mere prospect of delay of adjudication of fundamental rights is sufficient to make abstention improper, even when state law may be unclear or when state court resolution could avoid adjudication of a federal issue. In *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), the district court had abstained from deciding a vagueness challenge to a state statute that impinged on First Amendment freedom. This Court reversed, refusing to:

> . . . ignore that abstention operates to require piecemeal adjudication in many courts, . . . thereby delaying ultimate adjudication on the merits for an undue length of time, . . . a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms . . .

Id. at 378-79. See also *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967). The Court noted that the proceedings in *Baggett* v. *Bullit* had been pending for two years while the statute under challenge remained in force. Petitioners also have been delayed for two years, yet their fundamental voting rights go unprotected.

In another voting rights case, this Court sustained a district court's refusal to abstain from adjudicating the constitutionality of a state statute requiring payment of a poll tax or a six months advance registration as alternate requisites to voting. *Harman* v. *Forssenius*, 380 U.S. 528 (1965):

> In appraising the motion to stay proceedings, *the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens.* The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. *Given the importance and the immediacy of the problem and of the delay inherent in referring questions of state law to state tribunals*, it is evident that the District Court did not abuse its discretion in refusing to abstain.

Id. at 537 (emphasis added). If petitioners here, also a broad class of citizens who have had their rights to vote impaired, are correct about the unconstitutionality of the California gerrymander, they have already been made to suffer dilution of their proper voting strength in the 1984 elections and, with no end of the abstention in sight or promised, the 1986 elections (with the long lead time they necessarily entail) loom near.

Griffin v. *School Board*, 377 U.S. 218 (1964), held that it was error to apply the *Pullman* analysis when constitutional rights were being impaired and delay aggravated the impairment. Adopting this Court's approach, another court of appeals has aptly said, "The delay inherent in abstention takes a particularly heavy toll when a voting rights challenge raises doubts in the public mind about the legitimacy of officeholders and the governmental bodies on which they serve." *Duncan* v. *Poythress*, 657 F.2d 691, 699 (5th Cir. 1981).

The misapplication of the abstention doctrine to delay and thereby to deny petitioners the vindication of their

voting rights is inconsistent with decisions of this Court. This Court has emphasized (1) that, in any kind of case where a substantial challenge based on federal law is made to a state enactment, abstention is the exception, not the rule, an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it and (2) that redistricting and other voting rights cases, where the passage of time without a remedy has peculiarly severe consequences, are special and thus call for narrowing even further the narrow exception that is the abstention doctrine. Other federal courts have accepted the lesson of this Court's reapportionment cases. Federal courts are the proper forum for their adjudication and abstention plays little, if any, role. In no other congressional redistricting case of which the petitioners are aware has a federal court abdicated its duty to decide substantial federal claims pending the disposition of state claims.

II. ABSTENTION IS IMPROPER AS FEDERAL LAW CONTROLS CONGRESSIONAL REDISTRICTING CASES

Federal law, not state policy, sets the standard for reviewing congressional redistricting cases. *Wesberry* v. *Sanders*, 876 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, 103 S.Ct. 2653 (1983). This Court has refused to allow federal constitutional standards to be diluted by state concerns. If the applicable federal standard is not met, it is immaterial whether the statute is legal as a matter of state law. *McNeese* v. *Board of Education*, 373 U.S. 668, 674 (1963).

In contrast to the courts below, the three-judge district court in *Bandemer* v. *Davis*, *supra*, which is on appeal to this Court, applied these lessons well. That case was brought by Democratic Party plaintiffs in Indiana *claiming both state and federal* constitutional violations. That court, without a word about abstention, allowed the state

claims to be pleaded, briefed, and argued astride the federal constitutional claims. When it found that the political gerrymandering against the Indiana Democrats was so egregious as to violate the federal guarantee of equal protection of the laws, the court simply disregarded the pendent state constitutional claims as unnecessary to its decision. That sensible manner of proceeding accords with what all the other federal courts, except the courts below, have done in congressional redistricting cases.

Every federal court that considered congressional redistricting following the 1980 decennial census, adjudicated the federal claims despite the presence of pendent state law claims in some of the same lawsuits.[10] *See, especially, Ryan* v. *State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir. 1981), where the parties raised only federal constitutional and statutory claims against Illinois' congressional redistricting before the federal district court. The Court of Appeals for the Seventh Circuit held that the district court "had no authority to abstain." *Id.* at 1135. With the deletion of state law claims from the second amended complaint, the petitioners' case is not different from that in *Ryan*. The *Ryan* court noted that where the parties, as do petitioners here, "assert *only* federal constitutional and statutory claims . . . . [a] state court could not render these claims moot by deciding the case on state grounds because no such grounds exist." *Id.* at 1136. (Emphasis in original). Moreover, three-judge federal panels were the forum for virtually every other

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[10] *See Flateau* v. *Anderson*, 537 F.Supp. 257 (S.D.N.Y. 1982); *In re Pennsylvania Congressional Districts Reapportionment Cases*, 535 F.Supp. 191, 567 F.Supp. 1507 (E.D. Penn. 1982) (included pendent state law claim regarding compactness and contiguity requirements); *Carstens* v. *Lamm*, 543 F.Supp. 68 (D. Colo. 1982) (included pendent state law claim regarding compactness and contiguity requirements); *Major* v. *Treen*, 574 F.Supp. 325 (E.D. La. 1983); *In re Illinois Congressional Districts Reapportionment Cases*, —— F.Supp. —— (N.D. Ill. 1982), *aff'd sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982).

congressional redistricting case following the 1980 decennial census.[11]

The district court decision in *Bandemer* v. *Davis* is pertinent to this case in another way. It is fair to infer that the decisions of the courts below to abstain from adjudicating petitioners' claims are motivated in part, at least, by the perceived uncertainty regarding the justiciability of the underlying gerrymandering issue. (*See* p. 10a, *infra*, footnote 5.) Even if this were a basis for abstention, *Bandemer* v. *Davis* demonstrates the substantiality of the issue and the lower courts' error in this regard. This Court recognized in the seminal reapportionment case of *Reynolds* v. *Sims* that "history has been a continuing expansion of the scope of the right to suffrage in this country." 377 U.S 533, 555 (1963).[12]

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[11] *Goddard* v. *Babbitt*, 536 F.Supp. 538 (D. Ariz. 1982); *Dublin* v. *White*, 528 F.Supp. 1323 (E.D. Ark. 1982); *Clem* v. *Haben*, —— F.Supp. —— (N.D. Fla. 1982), Case No. TCA 82-0933; *Busbee* v. *Smith*, 549 F.Supp. 494 (D.D.C. 1982) (Georgia); *Travis* v. *King*, 552 F.Supp. 554 (D. Hawaii 1982); *O'Sullivan* v. *Brier*, 540 F.Supp. 1200 (D. Kan. 1982); *LaComb* v. *Growe*, 541 F.Supp. 145, 541 F.Supp. 160 (D.Minn. 1982); *aff'd mem. sub nom. Orwoll* v. *LaComb*, 456 U.S. 966 (1982); *Jordan* v. *Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982); *Shayer* v. *Kirkpatrick*, 541 F.Supp. 922 (W.D. Mo. 1982), aff'd, *Schatzle* v. *Kirkpatrick*, 456 U.S. 966 (1982); *Daggett* v. *Kimmelman*, 535 F.Supp. 978 (D. N.J. 1982), *aff'd on appeal sub. nom. Karcher* v. *Daggett*, —— U.S. ——, 106 S.Ct. 2653 (1983); *Flanagan* v. *Gillmor*, —— F.Supp. —— (S.D. Ohio 1982); *South Carolina State Conference of Branches of the NAACP* v. *Riley*, 533 F.Supp. 1178 (D.S.C. 1982), *appeal dismissed*, 459 U.S. 1026 (1982); *Seamon* v. *Upham*, 936 F.Supp. 931 (E.D. Tex. 1982), *vacated per curiam*, 456 U.S. 37 (1982); (*Doph* v. *Munro*, —— F.Supp. —— (W.D. Wash. 1982); *State AFL-CIO* v. *Elections Board*, 543 F.Supp. 630 (E.D. Wis. 1982).

[12] This historical development, and its relationship to political gerrymandering, is discussed at length in: Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket*, 1 J.L. & Pol. 357 (1984).

In *Bandemer*, which concerned the redistricting of the Indiana legislature, the district court found that "political gerrymandering did occur and the [Democratic Party] plaintiffs were disadvantaged thereby." *Id.* at 24. The court found that partisan considerations motivated the Republican-controlled Indiana legislature in constructing state legislative districts, and that the resulting district lines had a significantly adverse impact upon Democratic voters. The court concluded that the plan was invalid as a denial of fair and effective representation and, thus, of the equal protection of the laws. *Id.* at 24-25.

In finding a violation of the Fourteenth Amendment, the *Bandemer* district court was persuaded by this Court's rejection of New Jersey's 1981 congressional redistricting in *Karcher* v. *Daggett*, *supra*, because of the many similarities between the facts in the New Jersey and Indiana redistrictings, and by the analyses of political gerrymandering in Justice Stevens' concurrence and Justice Powell's dissent in *Karcher*. Petitioners are informed by the Clerk of the United States District Court for the Southern District of Indiana that the *Bandemer* defendants filed a notice of appeal to this Court on January 11, 1985.

Because this case concerns congressional districts, there is even less reason to defer to state authorities, and an even broader constitutional base for a decision that the gerrymander is invalid: Article I, Section 2, of the United States Constitution as well as the First and Fourteenth Amendments.

III. CONTINUING ABSTENTION AFTER THE CALIFORNIA SUPREME COURT REFUSED TO HEAR THE CASE CONFLICTS WITH DECISIONS IN OTHER CIRCUITS

The court of appeals stated quite pointedly that it did "not necessarily agree with the reasons stated by the district court in support" of its decision that abstention should continue and apparently rested its decision affirm-

ing the district court solely on the ground that it was "not satisfied that the Republicans have effectively pursued their claim in state court." (P. 2a, *infra.*) If petitioners are right that they should never have been remitted to their state court remedies in this voting rights case, the court of appeals' rationale is plainly insufficient to justify further abstention.

Even if petitioners had some duty to repair to state courts, that duty has been discharged. In asking the Supreme Court of California for a writ of mandate, petitioners pursued their claim in exactly the way that has been the accepted procedural route in California redistricting cases.

The Supreme Court of California has jurisdiction of original writs of mandate and has regularly, and without exception for more than 20 years, exercised that jurisdiction in statewide reapportionment cases to render speedy and final decisions. *See e.g. Assembly* v. *Deukmejian*, 30 Cal.3d 638 (1982) (establishment of districts for 1982 election); *Legislature* v. *Reinecke*, 10 Cal.3d 396 (1973) (establishment of districts for 1974-80 elections); *Legislature* v. *Reinecke*, 6 Cal.3d 595 (1972) (establishment of districts for 1972 election); *see also Silver* v. *Brown*, 63 Cal.2d 316 & 841 (1965). In such cases, the California Supreme Court has made its rulings with extraordinary speed. *See e.g. Legislature* v. *Reinecke*, 6 Cal.3d 595 (34 days from filing of petition); *Assembly* v. *Deukmejian*, 30 Cal.3d 638 (70 days from filing of petition); *see also Wenke* v. *Hitchcock*, 6 Cal.3d 746, 750-51 (1972); *Brown* v. *Superior Court*, 5 Cal.3d 509, 514-15 (1971); *Farley* v. *Healey*, 67 Cal.2d 325, 326-27 (1967).

Even though the California Supreme Court has an extensive record of providing speedy and final judgment in other redistricting cases presented to it by original writ, it refused to do so in this case. That court itself has said that: "In *Pullman*-type cases, the federal court retains

jurisdiction so that it may either apply the resolved state law, or resolve the state question itself if the state courts refuse to do so for any reason." *National Audubon Society* v. *Superior Court*, 33 Cal.3d 419, 431, n.12 (1983).

Petitioners filed their petition for a writ of mandate in the California Supreme Court on September 30, 1983, within four days of the court of appeals' first decision sustaining the district court's abstention. They expected that the California Supreme Court would assume jurisdiction and resolve the matter finally and in a timely way. No such prompt and definitive resolution of the claims could be had in the pending Los Angeles County Superior Court action (or in any other hypothetical state court proceeding of the kind to which the court of appeals vaguely referred in its second opinion [p. 2a, *infra*]).

On October 27, the California Supreme Court denied the petition without hearing and, thus, even though it ostensibly invited further action in an appropriate state court, denied petitioner the possibility of any timely relief from a state court. The first of the procedural deadlines for congressional elections falls in December of the preceding year, according to the Secretary of State.

Petitioners were thus first ordered by the federal courts to seek initial relief in the California state courts, and were then refused even a hearing on their claims by a court that had an extensive history of hearing such cases. The record below indicates that, except in unusual cases, state court litigation that is prosecuted diligently takes as long as four or five years before resolution by the state Supreme Court. The decision of the California Supreme Court to decline to hear the case thus left two courses open to the petitioners: (1) to pursue litigation in the most congested trial court in the state—litigation unlikely to complete its journey through the state's judicial system before the 1988 elections; or (2) to request the three-judge district court to lift its order of abstension. Petitioners promptly followed the latter course upon

learning that they had been excluded from the State Supreme Court's docket.

The outer bounds of deference to state court proceedings in apportionment cases were defined in *Scott* v. *Germano*, 381 U.S. 407 (1965). There, the question posed was whether a district court should abstain pending the completion of the work of the state legislative and judicial authorities on the apportionment of the Illinois Senate. In holding, on June 1, 1965, that the district court should stay its hand, this Court also instructed the district court to "enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court," should complete their redistricting task so that "the same be accomplished within ample time to permit such plan to be utilized in the 1966 election. . . ." 381 U.S. at 409. The lower federal courts in this action may perhaps have followed a comparable course to the extent they granted the California judicial system an opportunity to adjudicate petitioners' charges before the 1984 election. Once the California Supreme Court refused to provide prompt relief, all basis for abstention had ended and the three-judge court should have proceeded promptly to adjudicate the matter and to do so before another election was held.

Two courts of appeals have explicitly recognized that abstention orders must end when the state judiciary has received and has declined an opportunity to resolve expeditiously issues that prompted an order of abstention. *Lister* v. *Lucey*, 575 F.2d 1325 (7th Cir. 1978), considered a decision by which a district court had refused to lift an abstention order, even after a state court had refused to resolve the state law issue involved, telling the plaintiffs that a petition to the state legislature must go before action in the state courts.

The Seventh Circuit rightly found that the district court's continued insistence on abstention was error:

> The first reason why waiting for additional state proceedings was inappropriate is that it is inconsistent with the general concern of federal courts about the delay inherent in a decision to abstain . . . and the related concern about the burdensomeness of resort to more than one decision-making process. Cf. *Baggett* v. *Bullitt*, 377 U.S. 360, . . . Clearly the steps that the district court impliedly required of the plaintiffs here are not the "easy and ample means" available in *Pullman*, 312 U.S. 496, 501, 61 S.Ct. 643, 85 L.Ed. 971, when the doctrine of abstention was conceived. *Id.* at 1331.

In *414 Theater Corp.* v. *Murphy*, 499 F.2d 1155 (2d Cir. 1974), the Second Circuit considered the propriety of a district court's termination of an abstention order after a state appellate court had "avoided decision" on the merits of the matter that had initially prompted abstention. The court of appeals sustained the district court's decision that "[the] state courts have had ample opportunity to consider the question . . . and have declined to do so." *Id.* at 1157. The court said:

> Where the state court has deliberately avoided an interpretation of a statute which might save its constitutionality or moot the federal claim, the abstaining federal court may certainly reassert the jurisdiction it was retaining in order to reach the merits. Neither comity nor sound judicial administration require the abstaining federal court to wait indefinitely for state courts to determine the merits. *See NAACP* v. *Gallion*, 368 U.S. 16, 82 S.Ct. 4, 7 L.Ed. 2d 85 (1961). *Id.* at 1157.

These opinions are in direct conflict with the decision below. Like the Seventh Circuit in *Lister*, the Ninth Circuit should have instructed the district court to evaluate and resolve the important federal questions that have been presented to it. The conflict between the decision in this case and the decision in *Lister* (and the analysis in *414 Theater Corp.*) present a matter that is in itself

worthy of plenary consideration under Rule 17(1)(a) of this Court.

Absent such review, millions of California citizens may be denied any meaningful vote in congressional elections for the rest of the decade.[13]

As Judge Schnacke noted in his dissent to the district court's June 19, 1984, decision, "The *Pullman* doctrine sanctions abstention . . . when a federal constitutional issue exists which might be mooted or presented in a different posture by state court construction of applicable state law." (P. 17a, *infra.*) In the current case, however, he wrote:

> [The] state statute at issue has become clear and certain . . . [and] is not susceptible of different constructions. Boundaries of individual congressional districts are clear and distinct. This redistricting scheme has been overtly validated in that it has been implemented in two congressional elections. (P. 17a, *infra.*)

Assessing the pendent claims of procedural infirmities in the enactment of the statute, as "not seminal to plaintiffs' present case," Judge Schnacke correctly pointed out that petitioners' primary grievance is that the gerrymandered statute "works an invidious discrimination against them, depriving them of their constitutionally protected right to vote." *Id.* Furthermore, Judge Schnacke notes that a state court determination of the validity of state claims "will not modify, obviate nor alter a federal claim of invidious political gerrymandering." (P. 18a, *infra.*)

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[13] Computer technology has significantly changed the redistricting process as performed by state legislatures. Absent review by this Court of the issues surrounding partisan gerrymandering, legislatures will have little guidance as to how to perform their redistricting duties. New technology provides very tempting avenues to discriminate against any political minority. In a very real sense, these issues will determine who will decide the membership of the House of Representatives: clever draftsmen, or the American voters.

The many parallels between this case, *Karcher* v. *Daggett, supra,* and *Bandemer* v. *Davis, supra,* are striking, and the underlying federal constitutional issues deserve an opportunity to be heard on the merits. As Judge Schnacke noted, "these parallels demand a full exploration of the merits of [petitioners'] case and that due consideration should be given now." (P. 20a, *infra.*) Inasmuch as this case has been pending for two years, petitioners are not seeking a premature adjudication, but, quite simply, a day in court on the merits of the federal constitutional claim of political gerrymandering.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ROGER ALLAN MOORE
E. MARK BRADEN
MICHAEL A. HESS
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

JAMES R. PARRINELLO
MARGUERITE MARY LEONI
NIELSEN, HODGSON,
PARRINELLO & MUELLER
650 California Street
Suite 2650
San Francisco, CA 94108
Attorneys for Petitioners

January 30, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2166

D.C. No. C-83-1126-RHS

ROBERT E. BADHAM, *et al.*,
Plaintiffs-Appellants,

—VS—

MARCH FONG EU, Secretary State of the State of California,
Defendant-Appellee,

ASSEMBLY OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,
Intervenors.

No. 84-7441

ROBERT E. BADHAM, *et al.*,
Petitioners,

—VS—

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

MARCH FONG EU, Secretary of State for the State of California, et al.,
Real Parties in Interest.

Appeal from the United States District Court for the Northern District of California

Robert H. Schnacke, District Judge, Presiding

Argued and Submitted September 13, 1984

[Filed Nov. 1, 1984]

Before: DUNIWAY, WALLACE, and PREGERSON, Circuit Judges.

MEMORANDUM

Registered Republican voters in several congressional districts in the State of California (the Republicans) challenge the decision by a majority of the three-judge district court which refused, at this time, to withdraw its order of abstention pending the resolution of California state law issues in the California state courts. We are governed by our earlier decision. 721 F.2d 1170 (9th Cir. 1983). The facts since that decision are outlined in the opinion of the district court.

Once more, we find it unnecessary to determine whether our jurisdiction over this matter is by appeal or by writ of mandamus. *See* 721 F.2d at 1171-72. In either case, we will not overturn the decision of the district court. We do not necessarily agree with the reasons stated by the district court in support of its opinion, but conclude there is an ample record to sustain the district court's decision.

We are not satisfied that the Republicans have effectively pursued their claim in state court. After the abstention order was final, no new petition was filed in the California Supreme Court. In the Superior Court of the State of California in and for the County of Los Angeles, no attempt was made to receive expedited resolution of the issues or to secure equitable relief. There is an insufficient showing by the Republicans that they cannot resolve the state issues in the state court early enough so that, if unsuccessful, they will be able to resolve their federal claims in the federal court in time for any required redistricting prior to the 1986 elections.

We do not interpret the opinion of the district court as limiting the Republicans to action only in the Superior Court of the State of California in and for the County of Los Angeles. They may choose any appropriate state

forum which will dispose of their claim. We, of course, make no decision as to which state forum or forums are appropriate.

The district court is well aware of our concern about federal voting rights and the need for a timely resolution of this case. *See* 721 F.2d at 1173. The district court's requirement of monthly status reports demonstrates a continuing interest in this controversy. Thus, the district court will be sufficiently informed as to any need to dissolve its order of abstention and, if appropriate, to resolve timely the federal voting rights claims.

At oral argument we acted on the motion to strike and to augment the record. All remaining motions are denied as moot.

AFFIRMED.

Note: The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in rule 21(c).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,

Plaintiffs,

vs.

MARCH FONG EU, Secretary of State of the State of California,

Defendant,

ASSEMBLY OF THE STATE OF CALIFORNIA and THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,

Defendant-Intervenors.

[Filed June 19, 1984]

Before: POOLE, Circuit Judge, and ZIRPOLI and SCHNACKE, District Judges

MEMORANDUM OPINION AND ORDER

POOLE, Circuit Judge:

Plaintiffs, registered Republican voters and officeholders, filed this suit on March 8, 1983, challenging the constitutionality of California Congressional Redistricting Assembly Bill 2X (A.B. 2X).

By an amended complaint, plaintiffs alleged that the bill violated the Constitution of the United States and the Constitution and statutes of the State of California. On June 20, 1983, we ordered abstention of rulings on the federal claims, and directed the parties to go to state court (at least one case raising the relevant issues had already been initiated) and attempt to obtain decision on the state law claims because such adjudication might well terminate the controversy altogether or substantially alter any remaining federal claims.

On December 12, 1983, without having obtained state court adjudication of any of the claims, plaintiffs came back to us and filed an application to reassert jurisdiction. They also requested leave to file a Second Amended Complaint purportedly containing only federal claims.

Upon full consideration we have determined that plaintiffs' application will be rejected because plaintiffs have not sought a resolution of the state law claims in good faith; they have not been refused such adjudication by any state court; the case still calls for resolution of the state law claims, if reasonably possible;[1] and because continued abstention does not present any danger to plaintiffs' voting rights which our reassertion of jurisdiction at this time might prevent.

We are convinced that such possibility does still exist.

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[1] The dissent believes that the state law issues are clear and certain and that their resolution by state courts will not "modify, obviate nor alter the federal" claim. Dissent at 3. We disagree. If a state court invalidates A.B.2X on any one of the state law claims, plaintiffs would have no reason to return to federal court. Moreover, if a state court invalidates the Secretary's "technical corrections" thus making the population deviation 3.283%, A.B.2X would be vulnerable to a one person one vote attack under Article I, § 2 of the Constitution. A federal court might therefore be able to avoid the more controversial claim of political gerrymandering.

HISTORY OF THE CASE

A.B.2X was passed by the California Assembly and Senate on December 30, 1982, signed by the Governor on January 2, 1983, and was chaptered. On January 5, 1983, the Secretary of State transmitted the chaptered bill to the Registrars of Voters and County Clerks.

The complaint alleged that A.B.2X violated Article I, § 2 of the Constitution of the United States by establishing districts containing population deviations of 3.283%. Subsequently the Secretary of State of California issued a series of "technical corrections" which, if valid, would reduce the deviations to .0538%.

Plaintiffs then amended the complaint to allege that A.B.2X was still invalid under state and federal law. Specifically, they alleged four violations of the California Constitution [2] and three violations of the federal Constitution.[3]

Plaintiffs moved for partial summary judgment. The Defendant Secretary of State, and the Defendants-Intervenors Assembly of the State of California and the California Democratic Congressional Delegation, moved to dismiss or for abstention.

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[2] (1) In making the technical corrections the Secretary of State violated California Constitution Article III, § 3, and Article XXI § 1 by usurping the legislature's role; (2) that the "three-reading" rule required by California Constitutional Article IV, § 8 had not been followed; (3) the plan violated California Constitution Article II, § 9 by attempting to thwart the manifest intent of the voters when they passed Proposition 10 by which a predecessor redistricting bill had been rejected; and (4) the plan failed to respect city and county units and contained non-contiguous districts, contrary to California Constitution Article XXI.

[3] (1) The plan violated due process and equal protection; (2) the population deviations exceeded constitutional limits, whether of 3.283%, as chaptered, or .0538% as implemented; (3) the plan is a political gerrymander intended to dilute Republican voting strengths.

This court held a plenary hearing on these motions on May 26, 1983. As indicated in the supporting and opposing documents of the respective parties, and argued at the hearing, the parties to the federal action were also parties in contemporary state court proceedings involving the same issues. On April 26, 1983, the California Democratic Congressional Delegation had filed a civil action in the Superior Court of the State of California for the County of Los Angeles seeking a declaration of the validity of A.B.2X. *The Members of the California Congressional Delegation, et al. v. March Fong Eu, et al.*, Los Angeles Superior Court, C-450 827. Named as defendants were the Secretary of State and the Republicans who are plaintiffs before us. The Secretary of State and the intervenors argued that we should withhold federal proceedings because our case was rife with state law issues, the decision of which would either eliminate the need for passing on, or would substantially alter the factual basis of the federal constitutional claims, as those issues were already joined in a state court forum.

After full argument, we took the motions under submission. On June 20, 1983, in a Memorandum of Decision, we ordered abstention on the authority of *Railroad Commission v. Pullman*, 312 U.S. 496 (1941), so that potentially dispositive state law questions could be determined by the California courts. *Badham v. March Fong Eu, Secretary*, 568 F.Supp. 156 (N.D. Cal. 1983) (*Badham I*). We abstained "until the state law issues are settled by the state court," but retained jurisdiction "to resolve" whatever federal issues remain. *Id.* at 161.

Plaintiffs informed the Ninth Circuit that our abstention order completely barred them from returning to federal court until the California courts actually decided the state law issues. We intended no such thing. All that we required was that the plaintiffs make a good faith effort to obtain a state court ruling on the state issues. If, after making this effort, plaintiffs were still without a state

court decision, we would surely reassert our jurisdiction. *See* Transcripts of Proceedings, May 26, 1983, at 117-120.

ACTION FOLLOWING ABSTENTION

These events occurred after we ordered abstention:

(1) On June 28, 1983, the Republican defendants, some of whom are plaintiffs in the federal action, filed demurrers and moved for change of venue in the state superior court action. On August 17, 1983, the superior court granted the demurrer as to the Republican National Committee but denied the demurrers filed by the other Republicans. The court also denied the notice for change of venue. The Republicans did not answer the complaint until September 16, 1983. There has been nothing further.

(2) On June 29, 1983, plaintiffs filed both a timely appeal and later a petition for writ of mandamus to the Court of Appeals for the Ninth Circuit. The case was expedited and oral argument was had on August 10, 1983.

(3) On September 26, 1983, the Court of Appeals issued its opinion affirming the abstention order. It concluded that all the requirements for abstention had been met, "[e]ssentially for the reasons stated by the district court * * *." *Badham v. United States District Court for the Northern District of California*, 721 F.2d 1170, 1172 (9th Cir. 1983) (*Badham II*).

(4) On September 30, 1983, plaintiffs filed with the Supreme Court of California a petition for a writ of mandate which tendered the state law issues mentioned above. *See* Exhibit B to plaintiffs' "Application to Federal District Court to Exercise Jurisdiction," *post*. The petition cited the pendency of the federal and Los Angeles Superior Court actions, describing the issues as "virtually identical." Petitioners urged that "the matter be briefed, argued and decided no later than November 1, 1983."

(5) On October 11, 1983, plaintiffs filed a petition for rehearing with the Ninth Circuit.

(6) On October 27, 1983, the California Supreme Court denied the petition for writ of mandate for three reasons:

> (1) The petition was premature because plaintiffs' petition for rehearing was pending before the Ninth Circuit;
>
> (2) plaintiffs delay between June 10, 1983, and September 30, 1983, in seeking relief in the Supreme Court prevented resolution of the disputed factual claims by the November 1, 1983, date specified by plaintiffs; and
>
> (3) the relief requested was inappropriate since time constraints might well necessitate use of the challenged congressional districts for the 1984 elections.[4]

(7) On December 12, 1983, the Ninth Circuit denied the petition for rehearing.

(8) On the same date, December 12, 1983, plaintiffs returned to this court where they filed their application

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[4] The California Supreme Court order reads:

> The petition for writ of mandate is denied, as premature.
>
> The issues presented are the subject of another action now pending in the United States District Court for the Northern District of California (Badham v. Eu, C-83-1126 RHS) in which that court's abstention order is not final. Petitioners' delay between June 10, 1983, and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an opinion by the November 1, 1983, date specified by petitioners. The relief requested is in any event inappropriate since, regardless of how the state law issues are resolved, time constraints might well necessitate use of the challenged congressional districts for the 1984 primary and general elections. (Assembly v. Deukmejian (1982) 30 Cal. 3rd 638, 660-661.)
>
> The denial of this petition is without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final.

to reassert jurisdiction, and motions for leave to file a Second Amended Complaint and for preliminary injunction.

Plaintiffs contend in their application:

(A) That comity no longer required abstention because the Supreme Court of California had declined to rule on the state law issues.

(B) Further delay would irreparably damage plaintiffs' constitutional right to vote.

(C) Plaintiffs had sought a state court adjudication of state law issues in good faith.

The Proposed Second Amended Complaint omits the prior specific allegations of violations of the California Constitution and statutory provisions. Plaintiffs purport to plead in paragraph 6 that A.B.2X only violates the federal Constitution in that it is a political gerrymander forbidden by Article I, § 2 and the Fourteenth Amendment.[5] Nonetheless, the following 20 paragraphs describe precisely the same conduct of the defendants as was charged in the First Amended Complaint, except that the governing California Constitutional and statutory references do not appear.

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[5] The dissent seems to believe that *Karcher v. Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983) establishes the justiciability of plaintiffs' political gerrymandering claim. This is not so. In *Karcher*, the plurality opinion invalidated the New Jersey plan solely because it violated the one person one vote principle of Article I, § 2 of the Constitution. They expressed no opinion on political gerrymandering. Obviously the plurality was not at all certain that the use of redistricting to favor one political party offended the Constitution. Only two justices, Stevens and Powell, indicated that they believed an equipopulous districting plan might violate the Constitution as a partisan gerrymander. Because the opinions of two justices alone do not constitute the opinion of the Court, *Karcher* does not establish the justiciability of plaintiffs' political gerrymandering claim.

Plaintiffs contend that, having abandoned their state law claims, this court now has before it for decision only purely federal claims. They argue that they have sought and failed to obtain state court adjudication; that there now are tendered only federal issues; and that under these circumstances, neither comity nor deference to principles of federalism justify further abstention.

RULING ON THE APPLICATION TO REASSERT DISTRICT COURT JURISDICTION

The record does not indicate that a formal order was entered on the Application. However, Judge Robert H. Schnacke, to whom the case had originally been assigned before the convening of the three-judge court, granted the motion for leave to file the Second Amended Complaint, and issued further orders supplementary thereto. These orders by a single judge were, of course, at all times subject to reconsideration by the full court. *See* 28 U.S.C. § 2284(b)(3).

The full three-judge court reconvened on April 13, 1984, for the purpose of considering whether abstention should be terminated and jurisdiction reasserted.

Having heard arguments of the parties and considered their submissions, we conclude that the abstention order shall remain in effect and the parties are directed to resolve the state court issues as indicated in our original order.

GOOD FAITH

Our analysis begins with the Ninth Circuit's admonition that,

> Clearly, the district court's permission for the parties to return to federal court if necessary is predicated on a *good faith effort* to obtain a disposition of the state law issues in state court.

721 F.2d at 1174 (emphasis added).

Plaintiffs contend that they have acted in good faith because they petitioned the California Supreme Court for a writ of mandate on September 30, 1983, four days after the Ninth Circuit affirmed our abstention order. Once the Supreme Court denied the petition, plaintiffs claim that abstention was no longer necessary.

We disagree. Plaintiffs' good faith claim fails on three grounds. First, the Ninth Circuit intended that the good faith effort should begin to run at the time of the abstention order, June 20, 1983, not at the time its opinion issued, September 26, 1983.

> Thus, if the Republicans later seek to obtain a ruling by the district court prior to action by the state courts, the district court must examine any allegations that the Republicans have not acted in good faith, *especially during the time period following its abstention order.*

721 F.2d at 1174 (emphasis added). Between June 20, 1983, and September 30, 1983, plaintiffs made no attempt to present the state law issues to the state courts. Indeed, they actively resisted adjudication in the superior court. This delay was one of the reasons cited by the California Supreme Court for its denial of plaintiffs' petition. *See* Note 3. This three month delay does not constitute good faith.

Second, plaintiffs have mischaracterized the California Supreme Court's denial of their petition for a writ of mandate. Plaintiffs imply that the Supreme Court has completely refused to rule on the state law issues thus depriving plaintiffs of a state forum. This is not so. The Court explicity denied the petition "without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final." The Court did not intend to close off the California courts as plaintiffs would have us believe. The state courts are open and now that the abstention order

is final there is no reason why plaintiffs cannot seek a prompt and final resolution of the state law issues in the "appropriate" state court.

Plaintiffs reliance on *Lister v. Lucy*, 575 F.2d 1325 (7th Cir. 1978) *cert. denied* 439 U.S. 865 (1978) and *414 Theatre Corp v. Murphy*, 499 F.2d 1155 (2d Cir. 1974) is misplaced because in both those cases an action was initiated in the state trial court and on appeal the state appellate court refused to rule on the issues that prompted the federal court to abstain. Here, plaintiffs never brought an action in the state trial courts. Instead they petitioned the California Supreme Court for extraordinary relief and gave that Court only 30 days in which to resolve complicated issues of state law. The Court's denial of the petition is understandable and expressly keeps the state courts open to the plaintiffs in contrast to *Lister* and *414 Theatre Corp.*

Third, the action pending in the Los Angeles Superior Court is very much alive. Plaintiffs contend that that court is not an adequate forum because defendants are intent on delaying the proceedings. This contention is without merit. The Congressional Delegation filed the state court complaint on April 26, 1983. Plaintiffs, who are defendants in the state court, actively delayed the action by filing demurrers and a motion for change of venue. They did not answer until September 16, 1983. Since then they have rested.

Plaintiffs mistakenly believe that the entire burden for expediting the state court action falls on the democrats. A cursory glance at California law indicates that either party can commence discovery, *see* Code of Civil Procedure § 2016(a), file an at-issue memorandum, Rule 206 of the California Rules of Court, or move for summary judgment. Code of Civil Procedure § 437(c). As the parties seeking relief from A.B.2X, palintiffs have at least equal responsibility for expediting the state proceed-

ings. They therefore share the blame for the delay in the superior court.

Therefore, we hold that plaintiffs have not made a good faith effort to obtain a disposition of the state law issues in state court. The California Supreme Court has invited plaintiffs to seek relief in the "appropriate" state court and the action in Los Angeles Superior Court provides plaintiffs with a sufficient opportunity to obtain a ruling on the state law issues.

DELETION OF STATE CLAIMS

Plaintiffs also argue that abstention is no longer required because their proposed Second Amended Complaint omits all of the state law issues. This argument is without merit. Abstention is not based on the parties' artful pleading. It rests on the much loftier considerations of comity and sound judicial administration. It is these considerations and not the pleadings that form the basis for abstention. *Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Santa Fe Land Imp. Co. v. City of Chula Vista*, 596 F.2d 838, 840 (9th Cir. 1979) ("Appellants cannot be allowed to frustrate the policies underlying the doctrine of abstention by this simple expedient [of not raising state claims in their complaint].").

CONCLUSION

The motion to vacate the abstention order is denied. All of the other motions filed by the parties are also denied.

At the April 13, 1984, hearing before us, plaintiffs have conceded that even when they filed their December application, it was already too late to formulate a new plan for the 1984 Congressional elections. All parties have agreed that relief, if any, could be effective only for the 1986 elections. We are aware that issues of such fundamental importance ought to be resolved with as

great dispatch as reasonably possible, but we are not inclined to accept frustration of a clearly sensible and valid order of abstention merely because no truly good faith effort to comply therewith has been pursued.

To ensure that the state proceedings will not be unnecessarily delayed, the parties are directed to file monthly progress reports with this court. These reports, which may be filed separately or jointly, shall identify all action that has taken place in the state courts. The first report shall be filed thirty days after this decision is filed.

Also, at stated times the full court may schedule status conferences in order that the parties may speak directly of their progress in state court.

Dated: June 18, 1984

/s/ Cecil F. Poole
CECIL F. POOLE
United States Circuit Judge

I concur.

/s/ Alfonso J. Zirpoli
ALFONSO J. ZIRPOLI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Plaintiffs,

vs.

MARCH FONG EU, Secretary of State of the State of California,
Defendant,

ASSEMBLY OF THE STATE OF CALIFORNIA and THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,
Defendant-Intervenors.

[Filed June 19, 1984]

DISSENTING OPINION

I respectfully dissent from the majority's view that further abstention is required. This case in its present posture, presents a matter of federal constitutional law of first impression. Its resolution should not be delayed by a misapplication of the doctrine of abstention. The majority ultimately bases its decision on a finding of bad faith on plaintiffs' part. I find no such instances grave enough to justify the inherently harmful delays of abstention. To further abstain poses grave danger to the

constitutionally protected right to vote and to have each person's vote be given equal weight. I would have the three-judge panel exercise jurisdiction so that we may fully explore the merits of plaintiffs' case.

The *Pullman* doctrine sanctions abstention: (1) when a federal constitutional issue exists which might be mooted or presented in a different posture by state court construction of applicable state law; or (2) when difficult questions of state law exist which bear on policy problems of substantial public import, i.e., comity concerns [*Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)].

Under the first category, abdication of the obligation to decide cases is justified only where the issue of state law is uncertain [*Harman v. Forsennius*, 380 U.S. 528, 534 (1965)].

The availability in the California courts of declaratory relief is wholly beside the point. It is our duty, as part of the federal judiciary, to give due respect to plaintiffs' choice of this federal forum for the hearing and decision of the federal claim of political gerrymandering. Since the state statute at issue has become clear and certain, we need not reach the question of whether state court resolution of state issues will obviate or substantially modify the federal claim [*Wynn v. Carey*, 582 F.2d 1375, 1380 (7th Cir. 1978)]. A.B. 2X is not susceptible of different constructions. Boundaries of individual congressional districts are clear and distinct. This redistricting scheme has been overtly validated in that it has been implemented in two congressional elections.

The issues of the legislative methods and procedures used in the passage of A.B. 2X are not seminal to plaintiffs' present case. Plaintiffs' grievance is that A.B. 2X works an invidious discrimination against them, thereby depriving them of their constitutionally protected right to vote. To cause plaintiffs to repair to state court to decide collateral issues of procedural defects is an abusive

application of the doctrine. Moreover, a state court determination of validity of the Secretary of State's administrative corrections, changing district population deviations from 3% to under 1%, will not modify, obviate nor alter a federal claim of invidious political discrimination. This claim for relief survives a state court decision because the federal claim is wholly insensitive to equapopulous districts. The lack of uncertainty of A.B. 2X along with the lack of any potential for modification of the federal claim, seem to mandate non-abstention.

In addition, the majority ignores the equitable concerns in which the doctrine of abstention is rooted. Abstention is the exception, not the rule, and is appropriate only where repair to state court does not impose harmful delays [*Vickers v. Trainor*, 546 F.2d 739, 745 (7th Cir. 1976) citing *Bellotti v. Baird*,, 428 U.S. 132, 143 (1976)]. Here the delay occasioned by our first abstention order has denied plaintiffs any opportunity for relief in time for the 1984 elections. I believe that further abstention will jeopardize our ability to award any potential relief in time for the 1986 elections. The majority asserts there is sufficient time for resolution of all issues prior to the 1986 elections. The 1986 district lines must be in place prior to December 1985, leaving approximately one-and-one-half years for the parties to work through the overcrowded Los Angeles Superior Court trial calendar, then through the state appellate process and then to return to us for resolution of the federal issue. I believe the majority's confidence in our state and federal judiciaries' ability to move with such dispatch is unrealistic.

My colleagues have reached to find bad faith on plaintiffs' part and use this tenuous finding to overcome the equitable concerns of potential irreparable harm to plaintiffs' voting rights caused by the resultant delay. I disagree.

The Republicans' concern over the inappropriateness of the Los Angeles Superior Court action as the proper

forum for resolution is meritorious. Defendants are the moving party in that action and it is to their tactical advantage to proceed at a leisurely pace. Delays and postponements result in the continuing use of congressional districts drawn and passed by an allegedly partisan vote.

I also fail to find fault in plaintiffs' filing a demurrer as their first responsive pleading. Its partial success speaks of its own merit. The majority labels it a stalling device; but any delay in the State Court proceedigs works to the serious disadvantage of those who wish to have district lines redrawn in time for the next congressional elections.

Under the second category of abstention cases, abstention is inappropriate if there are no overriding comity concerns with the California courts. Here the state issues have been tendered to the highest state court. The California Supreme Court's denial of plaintiffs' request for extraordinary relief makes it clear that that court thought the prompt resolution of the state issues not sufficiently important to justify use of its inherent authority to decide those issues. The California Supreme Court has had the matter before it; it has decided not to act on the present posture of the case; this is sufficient to overcome any comity consideration and justifies the reassertion of federal jurisdiction [*Lister v. Lucey*, 575 F.2d 1325, 1332 (7th Cir. 1978), *414 Theatre Corp. v. Murphy*, 499 F.2d 1155, 1157 (2d Cir. 1974)]. The majority distinguishes these cases because, they say, all state avenues were closed in those cases and the only avenue of relief available was reassertion of federal jurisdiction. That, in a practical sense, is the situation here, by reason of the constraints of time. But, more importantly, neither of those cases was decided on the lack of availability of a state forum for resolution. The issue was whether the state courts had had an *opportunity* to decide the claims; and, finding there had been such an opportunity, it was held that deference had been given and comity concerns satisfied.

Federal courts are not available for relief only when plaintiffs come up against an impasse in state court. The majority itself acknowledges this interpretation in that, in our previous abstention order, it was unanimously agreed that plaintiffs need not wait until a final state court adjudication to return to the court. There are no comity concerns in the instant case and abstention is inappropriate on this alternate ground.

This court should not abdicate its responsibility to decide a difficult federal constitutional issue of first impression. We are not without guidance on how to proceed with a claim that political gerrymandering violates the Fourteenth Amendment. Subsequent to the initial filing of plaintiffs' case, the United States Supreme Court handed down its decision in *Karcher v. Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983) wherein the court discussed the issue of political gerrymandering. Justice Stevens' concurrence sets out objective guidelines for the review of such a claim. There are striking parallels between the New Jersey redistricting scheme declared unconstitutional and the California redistricting plan at issue in this case. This is not to suggest a premature decision as to the constitutionality of A.B. 2X, but rather that these parallels demand a full exploration of the merits of plaintiffs' case and that due consideration should be given now. Plaintiffs' request for the exercise of our jurisdiction should be granted.

Dated: June 6, 1984

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7487

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Plaintiffs-Appellants,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
Defendant-Appellee.

[Filed July 26, 1983]

ORDER

The application of plaintiffs-appellants for expedition of the appeal is hereby granted. The appeal will be heard by this court on Wednesday, August 10, 1983, at 3:00 p.m. in Courtroom #2 in the United States Court of Appeals and Post Office Building in San Francisco, along with the hearing of the petition for a writ of mandate, which is now scheduled to be heard at the same time and place, in the case of *Badham, et al. v. United States District Court*, No. 83-7487.

The parties are requested to file, within ten days from the filing of this order, simultaneous supplemental briefs dealing with the following questions:

1. Whether the order from which the appeal is taken is an appealable order.

2. Whether this case, as well as the petition for a writ of mandate, will be rendered moot if the people of the state of California adopt the initiative measure to redistrict the congressional districts in the state of California that is to be on the ballot and to be voted on by the people of California in December of 1983.

3. Whether the fact that the initiative measure is to be voted on in December is a reason for further abstention by this court or the district court.

The appeal will be heard upon the briefs and other papers filed by the parties in case No. 83-7487, which will be deemed the record on appeal in this case, and the two cases will be argued together, each side being allowed a total of one-half hour.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7487

D.C. No. CV 83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S., *Petitioners*,

—vs—

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *Respondent*,

and

MARCH FONG EU, Secretary of State of the State of California, *Real Party in Interest.*

[Filed Dec. 12, 1983]

Appeal from the United States District Court for the Northern District of California

ORDER

Before: DUNIWAY, WALLACE, and PREGERSON, Circuit Judges.

The petition for rehearing is denied. In stating that the district court had provided for the Republicans to "return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in state

court," *Badham v. United States District Court*, No. 83-7487, slip op. at 4732 (9th Cir. Sept. 26, 1983), we relied on representations to that effect made by one of the parties' counsel as an officer of this court. The following colloquy occurred at oral argument:

> *Counsel for the Secretary of State of California*—"The district court did indicate to all parties that if the state court proceedings were not proceeding rapidly enough, the parties could come back to the district court at any time and ask for reconsideration in light of the speed with which state proceedings were or were not proceedings."
>
> *Judge Wallace*—"That wasn't in the written order."
>
> *Counsel*—"No, I think it was in the transcript of oral proceedings."

Counsel now concedes the transcript of oral proceedings before the district court does not contain such a statement. Nonetheless, he still asserts that the district court did inform the parties at some point that the Republicans could return to their federal forum if the state courts moved too slowly.

We will continue to credit this representation to the extent of denying a rehearing. Should, however, the Republicans attempt to return to the district court on this basis, only to have the district court rule that it never allowed for a return before the adjudication of the state law claims in state court, the Republicans may appeal to this court on an expedited basis without briefing, or petition for mandamus. It is clear that appellate courts retain the power to order a trial of issues in an abstaining district court if, after a reasonable time, the state courts have failed to act. *See NAACP v. Gallion*, 368 U.S. 16, 16-17 (1961) (per curiam). Any appeal or petition in this matter shall be assigned to this panel for immediate consideration.

S.F. 24638

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

BADHAM *et al.*

v.

MARCH FONG EU, ETC., *et al.*

[Filed Oct. 27, 1983]

The petition for writ of mandate is denied, as premature.

The issues presented are the subject of another action now pending in the United States District Court for the Northern District of California (Badham v. Eu, C-83-1126 RHS) in which that court's abstention order is not final. Petitioners' delay between June 10, 1983, and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an opinion by the November 1, 1983, date specified by petitioners. The relief requested is in any event inappropriate since, regardless of how the state law issues are resolved, time constraints might well necessitate use of the challenged congressional districts for the 1984 primary and general elections. (Assembly v. Deukmejian (1982) 30 Cal. 3rd 638, 660-661.)

The denial of this petition is without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final.

/s/ Bird
Chief Justice

/s/ Mosk

/s/ Reynoso

/s/ Broussard

/s/ Kaus

/s/ Grodin

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-7487

D.C. No. CV 83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

MARCH FONG EU, Secretary of State of the State of California,
Real Party in Interest.

Appeal from the United States District Court for the Northern District of California

Cecil F. Poole, Robert H. Schnacke, Alfonso J. Zirpoli, Judges, Presiding

Argued and Submitted August 10, 1983

[Filed Sept. 26, 1983]

Before: DUNIWAY, WALLACE, and PREGERSON, Circuit Judges.

OPINION

WALLACE, Circuit Judge:

Registered Republican voters in several congressional districts in the State of California (the Republicans) challenge California Assembly Bill 2X, a congressional redistricting bill, on several state and federal constitutional grounds. A statement of the facts is contained in the district court's disposition, which follows this opinion. Employing the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (*Pullman*), the three-judge district court stayed the action pending resolution of the state law issues in state court. The district court retained jurisdiction to resolve any federal claims remaining following the state court adjudication. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-17 (1964). We affirm.

I

We are confronted initially with a question concerning the basis of our jurisdiction. The Republicans have filed both a notice of appeal under 28 U.S.C. § 1291 and a petition for mandamus under 28 U.S.C. § 1651. Determining which statute applies may be significant because on direct appeal we review the district court's order under an "abuse of discretion" standard, *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983) (*C-Y Development*), while under mandamus jurisdiction we employ a more stringent standard of review. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. 927, 933 n.6 (1983); *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978). Furthermore, me may not exercise mandamus jurisdiction over an action which is subject to direct appeal. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. at 933 n.6; *Helstoski v. Meanor*, 442 U.S. 500,

505-08 (1979); *Diamond v. United States District Court*, 661 F.2d 1198, 1198 (9th Cir. 1981).

Under some circumstances, a *Pullman* abstention order may be deemed a final order subject to direct appeal under 28 U.S.C. § 1291. *See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. at 933-34 (case involving *Colorado River* abstention); *Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir. 1983); *C-Y Development*, 703 F.2d at 375 (assuming jurisdiction by direct appeal). Here, however, not only has the district court retained jurisdiction to resolve the remaining federal claims, but those federal claims are substantial and constitute the essential part of the Republicans' case. The question thus arises whether an abstention order is final under these circumstances. In a recent decision, the Supreme Court touched upon but did not provide a definitive answer to this specific question. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S. Ct. at 933-34 & n.11.

We need not resolve the issue in this case, however, because jurisdiction clearly exists under one of the two statutes and we would affirm the district court's decision under either standard of review. We therefore proceed to the merits of the abstention issue.

II

To determine whether *Pullman* abstention is appropriate, the district court must apply a three-prong test:

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
>
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."

(3) The possibly determinative issue of state law is doubtful.

C-Y Development, 703 F.2d at 377, *quoting Canton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir. 1974), *quoting Pullman*, 312 U.S. at 498.

Applying this test, the district court concluded that all three requirements have been met in this case. Essentially for the reasons stated by the district court, we agree. The primary dispute between the parties is whether the second *Pullman* requirement was met. Abstention under this requirement is appropriate if state court adjudication will obviate the need to decide all of the federal constitutional questions or "will substantially reduce the contours of such adjudication and place it in a different posture" as a result of which "the constitutional issues will have been substantially narrowed and refined." *C-Y Development*, 703 F.2d at 380. We conclude that the district court's decision should not be overturned on this issue.

In addition, however, the Republicans argue that *Pullman* abstention is not appropriate in a voting rights case, or in the alternative, that such cases require consideration of factors beyond the three basic requirements of *Pullman*. They stress that in this case, the congressional district boundaries must be established no later than December 15, 1983 in order to be in time for the 1984 elections. Thus, abstention and its attendant delay may here serve to invalidate the Republicans' federal voting rights. Although we disagree that these circumstances require us to reverse the district court's order, we agree that abstention orders in cases involving voting rights require special consideration.

We reject the Republicans' contention that *Pullman* abstention may not be applied in voting rights cases. We have stated "that there is no *per se* civil rights exception to the abstention doctrine." *C-Y Development*, 703 F.2d

at 381; *accord Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981) ("An alleged denial of voting rights does not, in itself, constitute a 'special circumstance' which automatically precludes federal court abstention."), *cert. granted*, 455 U.S. 937, *cert. dismissed*, 103 S. Ct. 368 (1982). Thus, the district court was correct in applying the three-part *Pullman* test to the case before it.

On the other hand, "the Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, . . . racial equality, . . . and first amendment rights of expression . . . ." *C-Y Development*, 703 F.2d at 381 (citing cases). Many courts have expressed concern that in some cases the delay caused by abstention may effectively deny plaintiffs their constitutional rights. *See, e.g., Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964).

The dangers posed by an abstention order are particularly evident in voting cases. The right to vote is "fundamental 'because [it is] preservative of all rights,'" *Harman v. Forssenius*, 380 U.S. 528, 537 (1965), *quoting Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In addition, delay in such cases is particularly insidious. In a redistricting case such as this, for example, the courts' failure to act before the next election forces voters to vote in an election which may be constitutionally defective. Although a subsequent court may strike down the apportionment plan, there is no procedure for removing from office the officials elected under the defective plan. Moreover, these officials may acquire advantages of incumbency that may be difficult for their opponents to overcome in future elections held under a constitutionally valid plan. Thus, a delayed decision in such a case "strike[s] at the heart of repre-

sentative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Given these special dangers of delay, courts have been reluctant to rely solely on traditional abstention principles in voting cases. In *Harman v. Forssenius*, the Supreme Court upheld a district court's refusal to abstain in a case involving a state poll tax. The Court based its decision first on traditional *Pullman* considerations, concluding that the state statutes were clear and unambiguous and that state court construction of the statutes would not materially alter the nature of the problem. 380 U.S. at 535-36.

The Court did not rest its decision on these grounds alone, however, and went on to state:

> In addition to the clarity of the Virginia statutes, support for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation alleged and the probable consequences of abstaining. The District Court was faced with two class actions attacking a statutory scheme allegedly impairing the right to vote in violation of Art. I, § 2, and the Fourteenth, Seventeenth and Twenty-fourth Amendments. . . . In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.

380 U.S. at 537 (citations and footnotes omitted). Although *Harman* may be distinguished, the case demon-

strates the Supreme Court's concern over the special dangers inherent in applying abstention in voting cases. *See also O'Hair v. White*, 675 F.2d 680, 693-94 (5th Cir. 1982) (en banc); *Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971); *cf. Anderson v. Mills*, 664 F.2d 600, 603-04 (6th Cir. 1981).

The fundamental importance of the right to vote and the special dangers posed to that right by delay require a different approach to abstention orders in voting rights cases. We need not decide whether this different approach is in essence a separate requirement or merely a background against which to apply the traditional three-part test. We do hold that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote. Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote.

It may not be necessary to refuse to abstain in order to mitigate the dangers of delay. Instead, the district court may fashion its order in a way to reduce those dangers. The district court has done so in this case. In orally announcing its decision in this case, the court stated that the Republicans could return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in the state courts. Thus, the Republicans were given the opportunity to petition the federal court if it becomes apparent that federal constitutional rights are endangered by the abstention order. Although the district court could have set a specific date by which the parties would have been required to return so that the district court could determine if the state court proceedings were progressing swiftly enough,

reposing responsibility with the parties to advise the court is a reasonable alternative.

The district court's consideration of the delay factor and its decision whether to limit the length of time it is willing to defer are, like its ultimate decision based on the three traditional *Pullman* requirements, committed to the sound discretion of the district court. Here, the district court not only considered the deleterious effects of delay, but took affirmative steps to ameliorate the problem. In doing so, it adhered to established principles of federalism while also protecting the federal constitutional right to vote of California citizens. Under either applicable standard of review, we affirm its decision. The district court's abstention will have no immediate significant effect on federal voting rights. The deadline is December 15, 1983—six months after the abstention order. Therefore, as the matter presently stands, there is no immediate need for federal intervention.

Defendants argue that the Republicans themselves have been guilty of delay and have not pursued diligently their claims in state court. They contend further that absent such delaying tactics, the Republicans would have already had a swift resolution of their state law claims in state court. The argument is premature. Clearly, the district court's permission for the parties to return to federal court if necessary is predicated on a good faith effort to obtain a disposition of the state law issues in state court. Thus, if the Republicans later seek to obtain a ruling by the district court prior to action by the state courts, the district court must examine any allegations that the Republicans have not acted in good faith, especially during the time period following its abstention order. The issue will be ripe at that time.

III

After the district court issued its opinion in this case, the Republicans petitioned the court to reconsider its de-

cision in light of *Karcher v. Daggett*, 103 S. Ct. 2653 (1983). The district court subsequently entered an order stating that its decision was not affected by the Supreme Court's decision. We agree that *Karcher* does not affect the validity of the district court's order.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-1126 RHS

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, ROGER T. ERICKSON, D.D.S.,
Plaintiffs,

vs.

MARCH FONG EU, Secretary of State of the State of California,
Defendant,

ASSEMBLY OF THE STATE OF CALIFORNIA and THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION,
Defendant-Intervenors.

[Filed June 20, 1983]

MEMORANDUM OPINION

Plaintiffs, registered Republican voters in several congressional districts in the State of California, challenge California Assembly Bill 2X ("A.B.2X"), a congressional redistricting bill, on several state and federal constitutional grounds.

A.B.2X was passed by the California Senate and Assembly on December 30, 1982. Its passage was necessary because a predecessor redistricting bill, A.B. 301, had

been rejected by the voters in a referendum held earlier in 1982, on June 8. The Governor signed A.B.2X on January 2, 1983, and it was chaptered. On January 5, the Elections Division of the Office of the Secretary of State transmitted copies of the chaptered bill to all Registrars of Voters and County Clerks.

Plaintiffs claim that A.B.2X involved population deviations of 3.283%, in violation of Article I, § 2 of the Constitution of the United States. Those population deviations were purportedly reduced, however, by a series of rather substantial changes made in the law after its passage. On February 22, 1983,[1] a staff member of the Assembly Elections and Reapportionment Committee delivered a list of what the defendants and intervenors call "technical corrections" and census tract maps outlining the changes to the Office of the Secretary of State. The Secretary directed the changes and maps to the Registrars of Voters and County Clerks with the expectation that they will be implemented. These changes reduce the population deviation to .0538% by transferring over 39,000 persons between congressional districts. For example, the most populous district, District 16, transferred 8,593 persons to District 12, the least populous district. Plaintiffs claim that the changes were substantial and illegal. They particularly complain of the transfer between District 16 and District 12, because an amendment made to the bill just before passage, sponsored by Senator Mello, had transferred 8,576 persons from District 12 to District 16, resulting in the large deviation contained in the chaptered bill.

The plaintiffs' amended complaint, filed on March 31, 1983, alleges that A.B.2X and the "technical corrections"

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[1] This action was begun on March 4, 1983; there apparently was no public notice of the purported changes until some date thereafter, when the Secretary of State sent them to the various county officials. Thereafter plaintiffs filed their amended complaint.

made to it violate several state and federal constitutional provisions. The state constitutional violations alleged include: (1) the "technical corrections" implemented by the Secretary of State violate Article III, § 3 and Article XXI, § 1 because the Secretary is usurping the role of the legislature; (b) the reapportionment plan was enacted in violation of Article IV, § 8 because the "three-reading" rule was not followed; (3) the plan violates Article II, § 9 because it contravenes the voters' intent in rejecting Proposition 10 on the June 1982 ballot; (4) the plan violates Article XXI because it does not respect city and county units and contains non-contiguous districts.

Plaintiffs allege the following federal constitutional violations: (1) the "technical corrections" implemented by the Secretary of State violate due process and equal protection; (2) the reapportionment plan's deviation percentage exceeds constitutional limits whether it is the 3.283% under A.B.2X as chaptered or .0538% as implemented by the Secretary; (3) the plan is a political gerrymander.

Because the complaint contained both state and federal claims, the defendant and defendant-intervenors brought motions asking the three-judge court to abstain from deciding the state law issues under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

In the Ninth Circuit, *Pullman* abstention is appropriate when a three-prong test is satisfied: (1) The complaint "touches a sensitive issue of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." (2) "Such constitutional adjudication can be avoided if a definitive ruling on the state issue would terminate the controversy." (3) The possible determinative issue of state law is doubtful. *See C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983); *Canton v. Spokane School District No.*

81, 498 F.2d 840, 845 (9th Cir. 1974), *quoting Railroad Commission v. Pullman Co.*, 312 U.S. at 498.

(1) Sensitive issue of social policy.

Reapportionment, which is carried out by the states, is an area in which state courts are encouraged to require and formulate valid plans. *See Scott v. Germano*, 381 U.S. 407, 409 (1965) (district court should have stayed hand when Illinois Supreme Court had found the composition of the Illinois Senate invalid and retained jurisdiction to ensure a valid plan was created). The fact that a congressional apportionment, as opposed to a state legislative apportionment, is at issue in this case does not make the issue less sensitive. In both cases the federal one-person, one-vote rule applies. *See Reynolds v. Sims*, 377 U.S. 533 (1964). In both cases, the Supreme Court has found that courts should defer to efforts by the legislature, as long as they are constitutional, when adopting redistricting plans. *See Upham v. Seamon*, 456 U.S. 37, 41 (1982); *White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'") (*quoting Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Although the plaintiffs argue that three-judge courts have not abstained in congressional reapportionment cases, none of the cases cited by plaintiffs involved state law issues that would obviate or alter the federal constitutional issue (the second *Pullman* criteria). *See Flateau v. Anderson*, 537 F.Supp. 257 (S.D.N.Y. 1982); *In re Congressional Districts Reapportionment Cases* (N.D.Ill. 1982) (Exhibit C to Plaintiffs' Opposition to Motion to Abstain); *In re Pennsylvania Congressional Districts Reapportionment Cases*, 535 F.Supp. 191 (M.D. Pa. 1982); *Carstens v. Lamm*, 543 F.Supp. 68 (D.Colo. 1982).

(2) Avoidance or alteration of the federal constitutional issue.

To satisfy the second prong of the *Pullman* criteria, a state court determination need not entirely avoid the federal issue. It is enough that it materially alter the nature of the federal constitutional question. *See C-Y Development Co. v. City of Redlands*, 703 F.2d at 377-380 (abstention might avoid deciding proper remedy for permanent deprivation of property rights, leaving only question of remedy for temporary taking); *see also Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976) ("abstention is appropriate where [deferral to the state courts] '. . . might avoid in whole or in part the necessity for federal constituitonal adjudication, or at least materially change the nature of the problem.'") (*quoting, Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

In this case, an issue of state law presents a threshold question which will materially alter the federal constitutional question presented. The plaintiffs have claimed in Count VII of their complaint that the "technical corrections" implemented by the Secretary of State violate the state constitution. A decision on this state law issue will determine whether the three-judge court reviews the reapportionment plan with or without the challenged changes. With the changes the reapportionment plan, according to defendants, has a population deviation of only .0538%—a deviation percentage below that which the Supreme Court has found constitutional.[2] The unchanged, or original plan, in contrast, is more in doubt. Its population deviation of 3.283% comes closer to deviations found

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[2] There is no total percentage deviation that automatically makes a reapportionment plan constitutional. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). The plan must achieve one-person, one-vote as nearly as practicable. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The Supreme Court, however, has approved a plan with a total percentage deviation of .149%. *See White v. Weiser*, 412 U.S. 783, 786, 796 (1973).

constitutionally violative.[3] Since this case presents a state law issue which will materially alter the federal constitutional issue, the second prong of *Pullman* is satisfied.

This case also presents three state constitutional law questions that may obviate the federal constitutional issue. Plaintiffs argue that the reapportionment plan violates the "three-reading" rule (Article IV, § 8); that it contravenes the voters' intent in rejecting Proposition 10 (Article II, § 9); and that the plan does not respect city and county units and is non-contiguous (Article XXI). If A.B.2X is found invalid because it violates the California Constitution for any of the above reasons, the federal constitutional questions will become moot. These state law issues thus provide additional reasons for finding the second prong of *Pullman* satisfied.

(3) Doubtfulness of the state law issues.

To satisfy the third prong of *Pullman*, the possibly determinative state law issues must be doubtful. *See C-Y Development Co. v. City of Redlands*, 703 F.2d at 380-381; *Pue v. Sillas*, 632 F.2d 74, 78-79 (9th Cir. 1980). A state law issue is doubtful if it is "susceptible" of an interpretation that would avoid or modify the federal constitutional question. *See Babbitt v. Farm Workers*, 442 U.S. 289, 306 (1979); *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976).

The legality of the Secretary of State's implementation of the changed reapportionment bill is an issue of first

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[3] A total percentage deviation of 4.13% has been found to violate the constitution. *See White v. Weiser*, 412 U.S. 783, 785, 790-91 (1973). One three-judge panel has *approved* a plan with a percentage deviation of 3.79%. *See Drum v. Scott*, 337 F.Supp. 588 (M.D.N.C. 1972). However, the fact that the legislative committee was able to draft a plan with a lower percentage deviation makes A.B.2X's 3.238% deviation suspect. *See White v. Weiser*, 412 U.S. at 790 (the existence of proposed plans with lower total deviations indicated that it was possible and practicable to construct a redistricting scheme with lower populations among districts).

impression in California. No California case law or state statute provides a clear answer.

Plaintiffs argue that the "technical corrections" are in fact substantive amendments to A.B.2X and constitute an unconstitutional exercise by the Secretary of the Legislature's power to redistrict. They allege that the Secretary's implementation violates Article XXI, § 1 of the California Constitution ("In the year following the year in which the national census is taken . . . , the Legislature shall adjust the boundary lines of the . . . Congressional . . . districts . . . ."). They also allege that the Secretary is in violation of Article III, § 3 ("The powers of the state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

Defendants offer two theories in response, arguing that California Supreme Court precedent allows a reapportionment statute to be construed to include technical corrections; and that Cal.Election Code § 30000 permits them. Neither theory is without doubt, however. In adopting temporary reapportionment plans, the California Supreme Court has allowed incorporation of technical corrections in order to carry out legislative intent. *See Silver v. Brown*, 63 Cal.2d 841, 844-46, 48 Cal.Rptr. 609, 409 P.2d 689 (1966) (maps and census tracts contained errors which constituted a departure from the legislative history); *Legislature v. Reinecke*, 6 Cal.3d 595, 604, 99 Cal. Rptr. 481, 492 P.2d 385 (1972) (*Reinecke I*) (18 clerical errors corrected because the language of the legal descriptions departed from the maps and computer printouts relied upon by the legislature in passing the bill). It has also allowed clerical corrections made by special masters who drew up a reapportionment plan. *See Legislature v. Reinecke*, 10 Cal.3d 396, 401, 110 Cal.Rptr. 718, 516 P.2d 6 (1973) (*Reinecke IV*). And, the court has allowed the temporary use of a judicial plan which

included, according to defendants, corrections somewhat similar to those made in the plan at issue here. *See Assembly v. Deukmejian*, 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939 (1982). *Silver*, *Reinecke I*, and *Reinecke IV*, however, were not faced with the question at issue here: whether post-enactment changes, including shifts in population among districts to more closely comply with the one-person, one-vote standard, can be made other than by the legislature, particularly when there is evidence that legislative intent may have been something quite different. And *Deukmejian* expressly did not pass on the merits of the apportionment plan implemented by that case.

The application of Election Code § 30000 is similarly doubtful here. The statute provides:

> "Any maps describing the boundaries of the districts, as contained in this division, which have been prepared by the Legislature or a committee of the Legislature in connection with the enactment of this division may be deposited with the Secretary of State in order to illustrate the boundary lines set forth in this division. Maps deposited with the Secretary of State pursuant to this section may be used by the Secretary of State and the several county clerks for the purposes of assisting in the interpretation of this division and to facilitate the Secretary of State and county clerks in their administrative functions involved in the conduct of elections."

Plaintiffs argue that Election Code § 30000 does not permit the Secretary to adopt congressional districts that depart from the language of the bill as chaptered. Defendants offer a different interpretation. They argue that the statute's provision for the Secretary's interpretation is license for departure from the literal words of the bill as chaptered; that the Secretary has interpreted the bill to include the "technical corrections" and that her interpretation should be given deference; and that the legislature passed this statute with the knowledge that its identical

predecessor had been interpreted similarly. These differing constructions of the statute put its application to this case in doubt.

Since Election Code § 30000 may be "susceptible" of an interpretation that would modify the federal constitutional question, the third prong of the *Pullman* test is satisfied.

Some of the other state law issues involved in this case are also doubtful. Plaintiffs argue that A.B.2X is void because it violates the "three-reading" rule of Article IV, § 8 of the California Constitution. It will be necessary to decide whether *People v. Peete*, 54 Cal.App. 333, 369 (1921) (rejecting a challenge to an earlier three-reading rule) controls the present case.

Plaintiffs also attack A.B.2X as violative of Article II, § 9 of the constitution because it contravenes the voters' intent in rejecting Proposition 10. The California Supreme Court has said the new measure must be "essentially different" from the rejected provision and enacted "not in bad faith, and not with intent to evade the effect of the referendum petition." *Assembly v. Deukmejian*, 30 Cal.3d at 678. Lower California courts have applied this test. *See Martin v. Smith*, 176 Cal.App.2d 115, 119-21, 1 Cal.Rptr. 307 (1959). In *Martin*, application involved comparing the two bills, discerning the intent of the voters in rejecting the first bill, and assessing the legislature's motive in passing the second bill. The outcome of such an inquiry is certainly not clear, and in any event, involves sensitive issues of state policy.

Plaintiffs' final state law argument is that the A.B.2X is invalid because it does not respect city and county units and is noncontiguous. Although a recent case discusses similar issues in assessing a reapportionment plan, *see Carstens v. Lamm*, 543 F.Supp. 68, 82 (D.Colo. 1982), the plaintiffs are alleging a violation of Article XXI, § 1, which has yet to be interpreted by a state court.

The rationale of *Pullman* applies most persuasively here. We shall abstain until the state law issues are settled by the state court. We shall, however, retain jurisdiction to resolve whatever federal issues remain.

Dated:

/s/ Cecil F. Poole
CECIL F. POOLE
United States Circuit Judge

/s/ Alfonso J. Zirpoli
ALFONSO J. ZIRPOLI
United States District Judge

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

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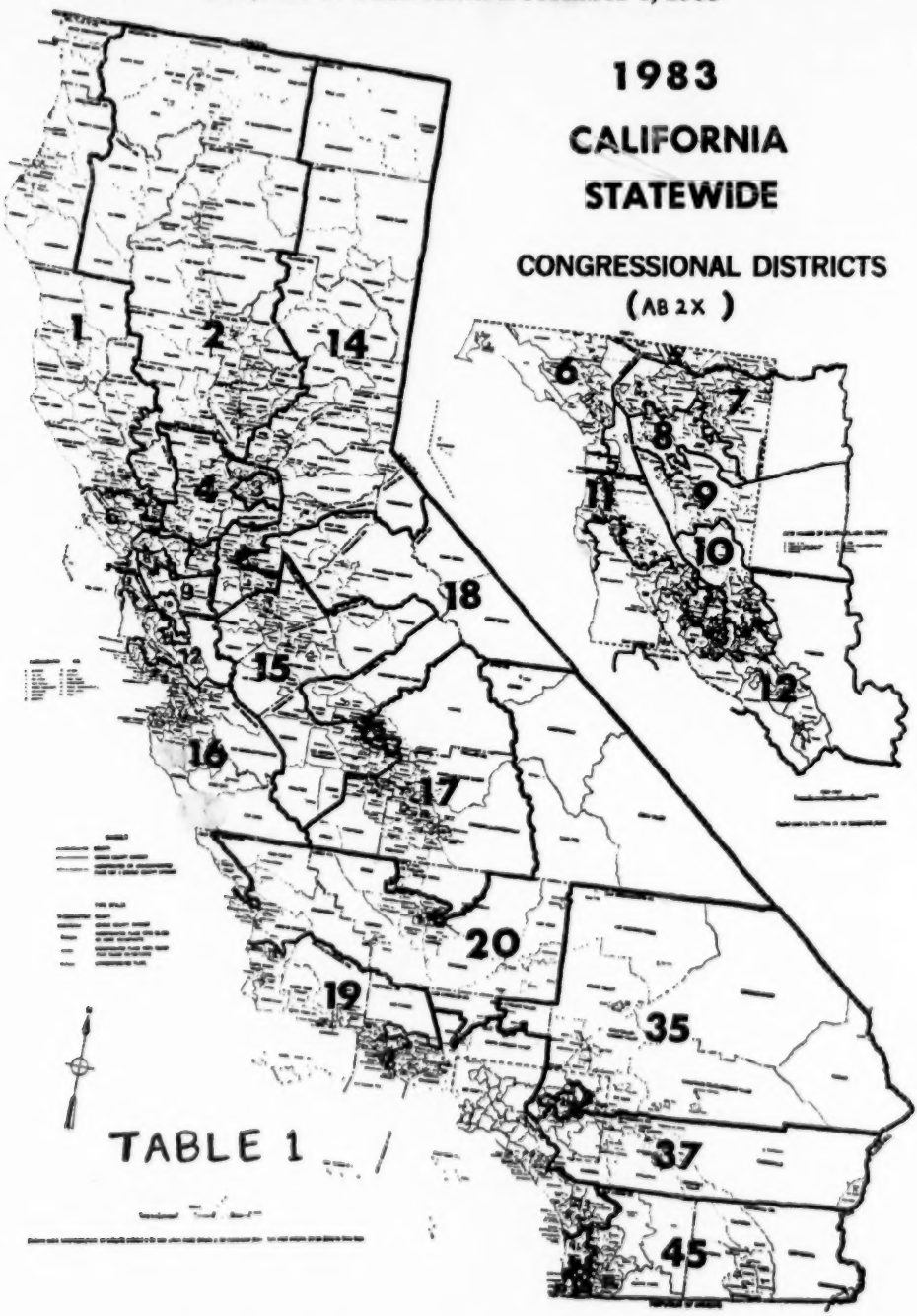
EXHIBITS 1 THROUGH 6

Reproduced from Petitioners Exhibits to Memorandum of Points and Authorities in Support of Preliminary Injunction Submitted to United States District Court for the Northern District of California December 8, 1983



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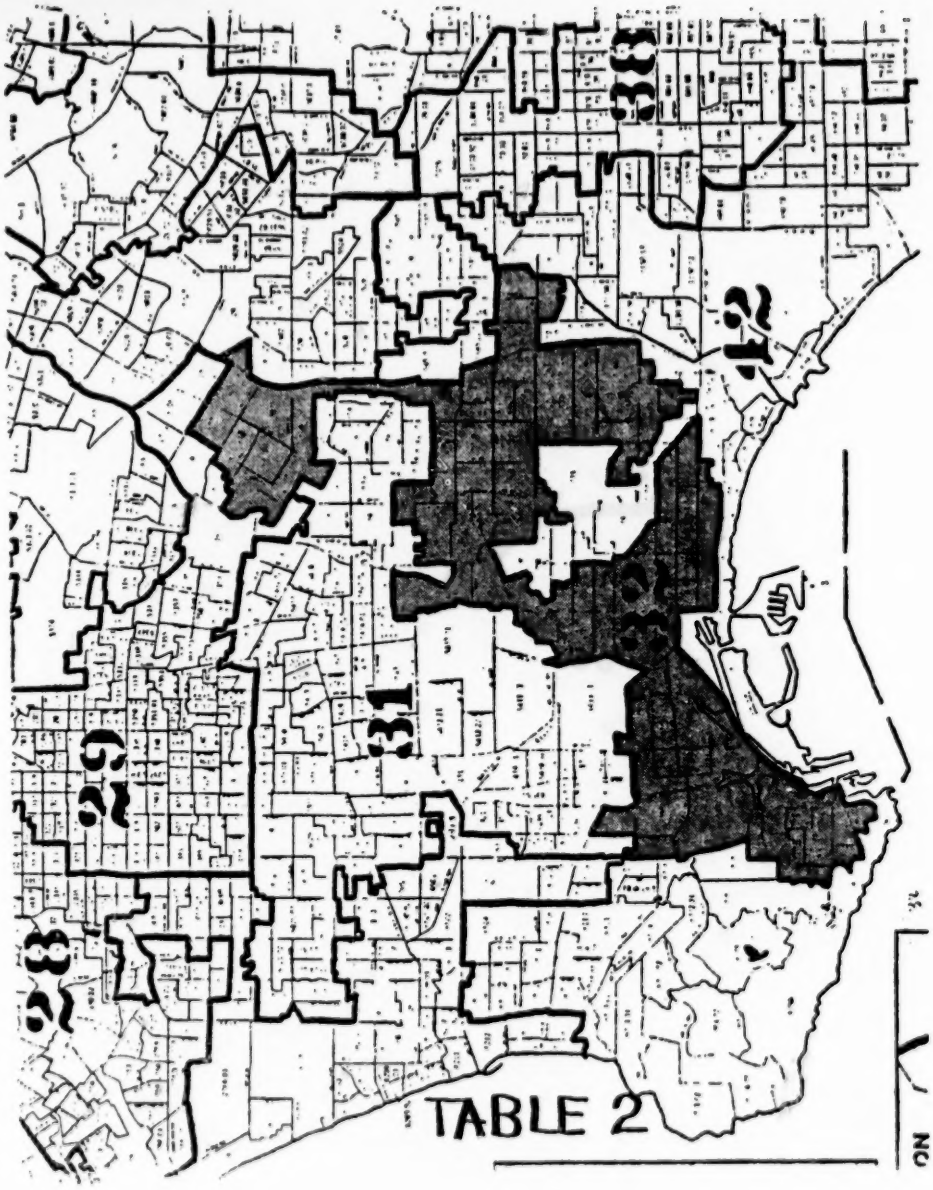

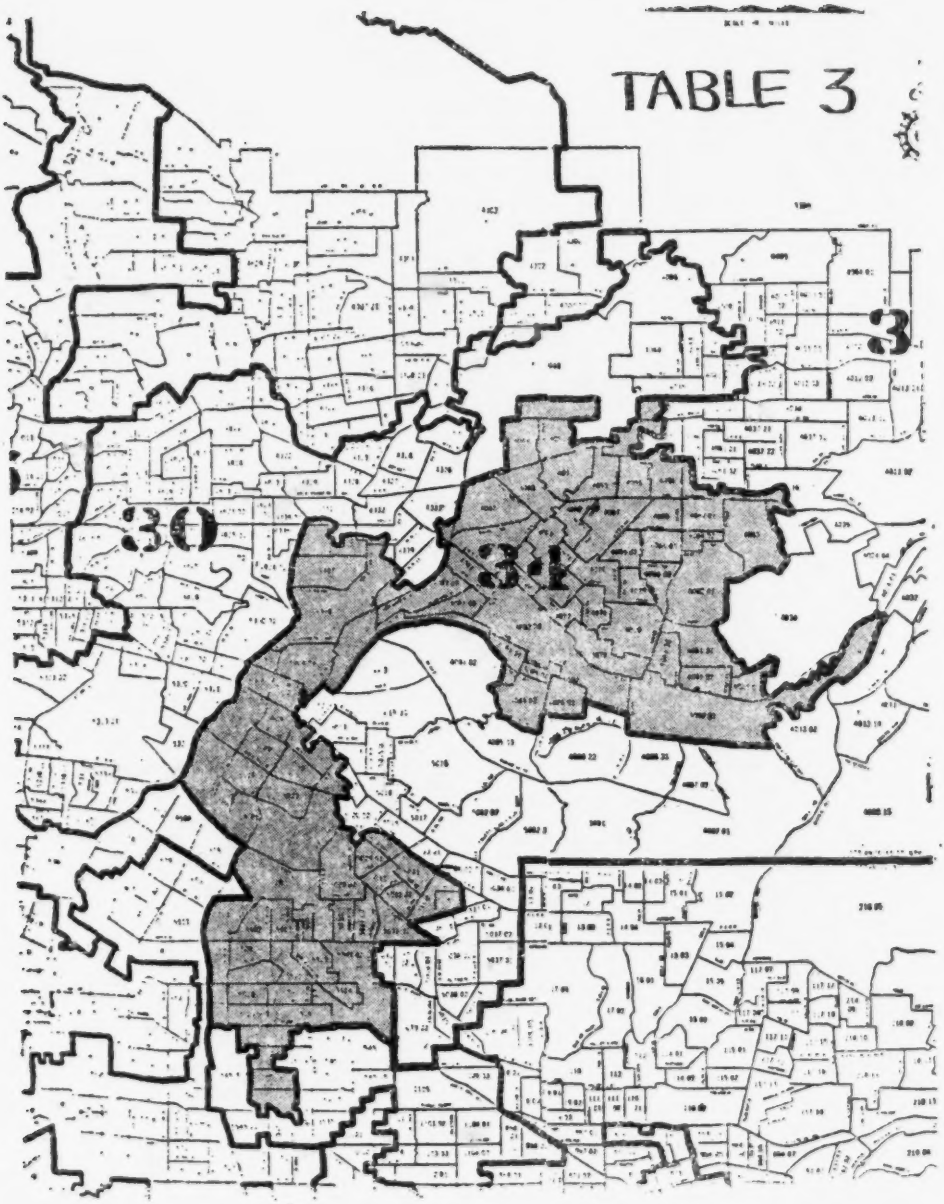

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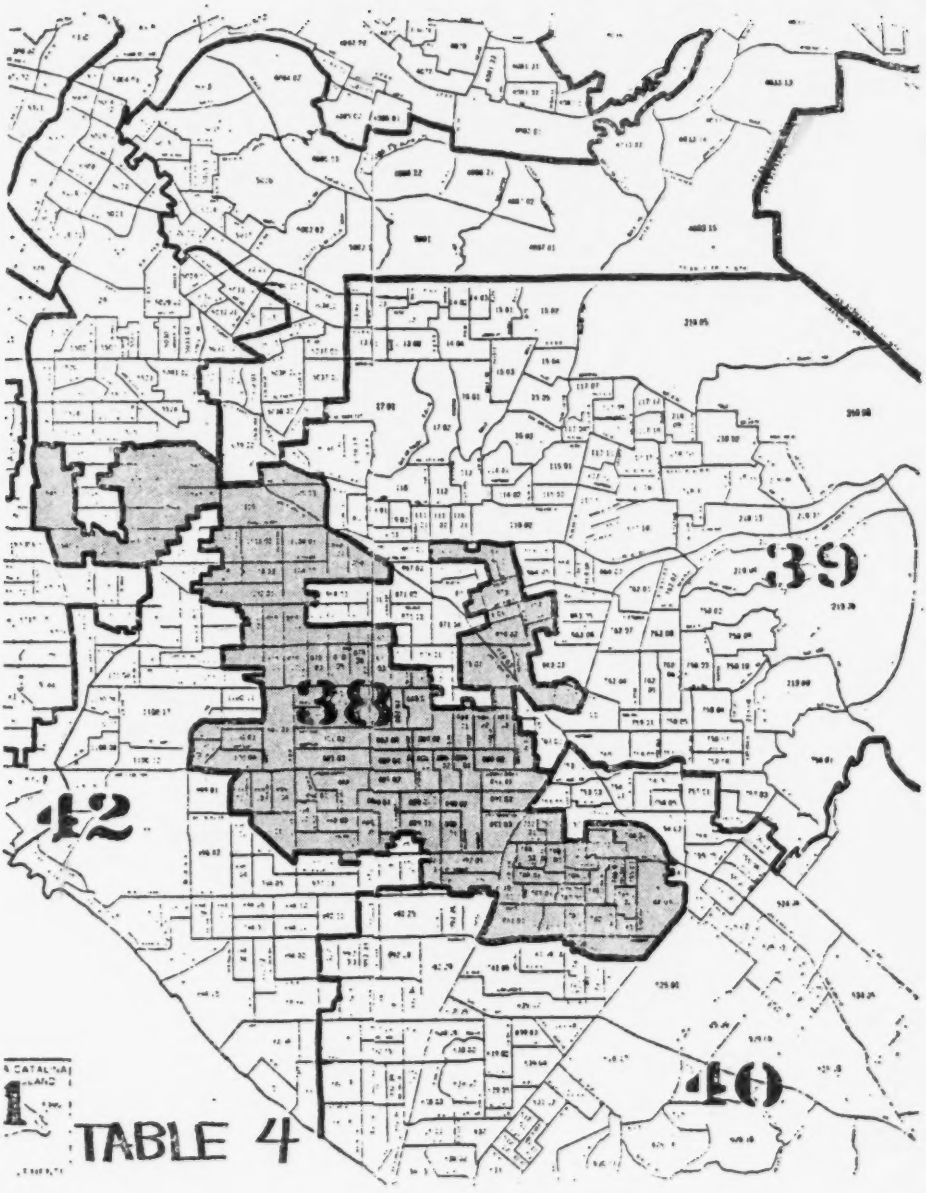

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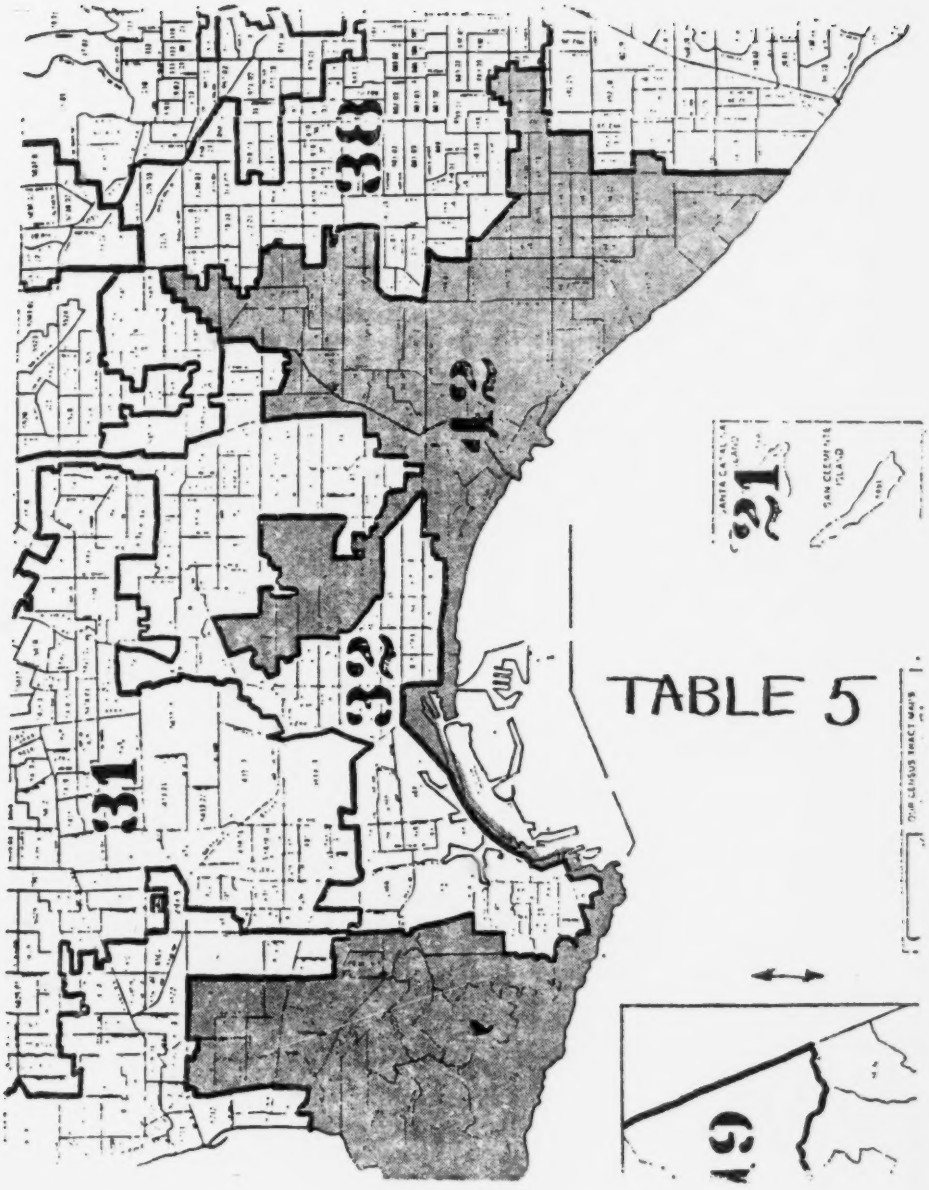

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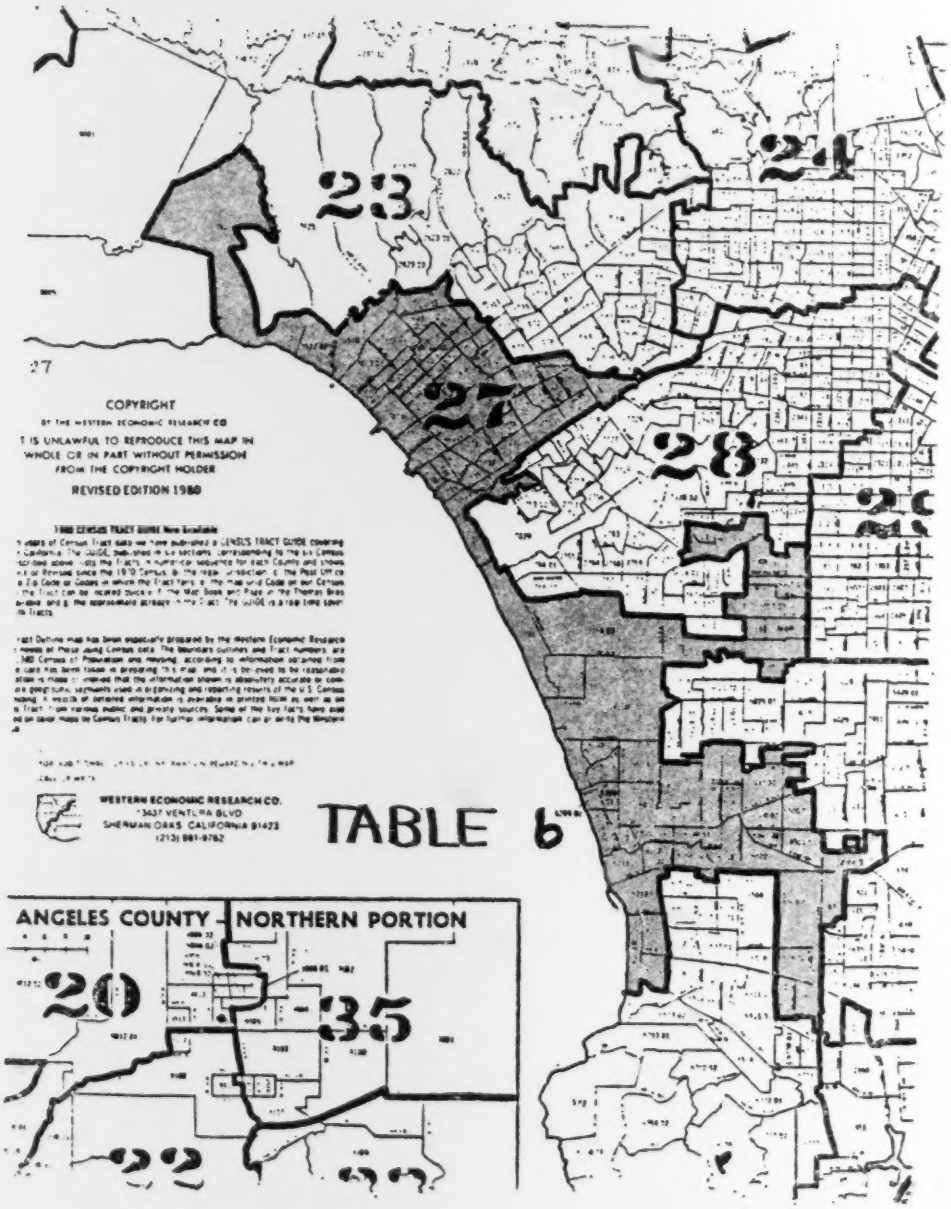
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TABLE 6
ANGELES COUNTY - NORTHERN PORTION
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1984 CALIFORNIA CONGRESSIONAL ELECTIONS
SEMI-OFFICIAL RESULTS *

	District	Incumbent	Winner	Net Change	Democratic Vote	Republican Vote	Other Vote	Total Vote	Margin Of Victory (%)	Democrat Percentage	Republican Percentage	Others
CA	3	D	D		125,309	0	0	125,309	100.0	100.0	0.0	0.0
CA	35	R	R		0	172,651	29,480	202,131	85.4	0.0	85.4	14.6
CA	22	R	R		0	178,782	30,988	209,770	85.2	0.0	85.2	14.8
CA	29	D	D		106,494	16,289	0	122,783	73.4	86.7	13.3	0.0
CA	28	D	D		109,753	32,225	2,818	144,796	53.5	75.8	22.3	2.0
CA	39	R	R		53,546	170,250	0	223,796	52.2	23.9	76.1	0.0
CA	45	R	R		44,420	145,014	3,857	193,291	52.0	23.0	75.0	2.0
CA	43	R	R		49,525	159,315	6,608	215,448	50.9	23.0	73.9	3.1
CA	14	R	R		57,263	175,631	6,708	239,602	49.4	23.9	73.3	2.8
CA	5	D	D		137,763	45,178	7,459	190,400	48.7	72.4	23.7	3.9
CA	25	D	D		71,756	23,717	4,224	99,697	48.2	72.0	23.8	4.2
CA	42	R	R		58,161	171,142	5,629	234,932	48.0	24.8	72.8	2.4
CA	21	R	R		60,655	168,765	4,250	233,670	46.2	26.0	72.2	1.8
CA	17	R	R		47,138	125,346	0	172,484	45.4	27.3	72.7	0.0
CA	33	R	R		52,925	142,951	6,892	202,768	44.4	26.1	70.5	3.4
CA	9	D	D		135,316	50,711	7,315	193,342	43.8	70.0	26.2	3.8
CA	16	D	D		149,252	58,385	3,231	210,868	43.1	70.8	27.7	1.5
CA	44	D	D		97,467	38,961	3,130	139,558	41.9	69.8	27.9	2.2
CA	20	R	R		58,233	142,186	0	200,419	41.8	29.1	70.9	0.0
CA	11	D	D		146,131	59,125	3,843	209,099	41.6	69.9	28.3	1.8
CA	31	D	D		97,972	40,440	0	138,412	41.6	70.8	29.2	0.0
CA	2	R	R		68,930	156,758	0	225,688	39.0	30.5	69.5	0.0

CA	6	D	D		159,727	69,518	5,488	234,733	38.4	68.0	29.6	2.3
CA	19	R	R		67,938	146,161	4,015	218,114	35.9	31.1	67.0	1.8
CA	18	D	D		125,178	60,808	0	185,986	34.6	67.3	32.7	0.0
CA	7	D	D		154,846	76,877	0	231,723	33.6	66.8	33.2	0.0
CA	15	D	D		106,518	53,078	3,067	162,663	32.9	65.5	32.6	1.9
CA	13	D	D		136,936	69,180	3,740	209,856	32.3	65.3	33.0	1.8
CA	24	D	D		93,811	48,751	5,012	147,574	30.6	63.6	33.0	3.4
CA	40	R	R		84,622	158,455	3,837	246,914	29.8	34.3	64.2	1.5
CA	41	R	R		83,552	156,554	7,114	247,220	29.4	33.8	63.3	2.9
CA	10	D	D		100,368	55,238	5,311	160,917	28.0	62.4	34.3	3.3
CA	37	R	R		83,932	146,196	0	230,128	27.0	36.5	63.5	0.0
CA	26	D	D		113,722	66,896	0	180,618	26.0	63.0	37.0	0.0
CA	12	R	R		88,368	150,144	5,663	244,175	25.3	36.2	61.5	2.3
CA	23	D	D		136,110	80,523	3,374	220,007	25.3	61.9	36.6	1.5
CA	4	D	D		127,133	75,522	3,934	206,589	24.9	61.5	36.6	1.9
CA	1	D	D		153,422	92,676	0	246,098	24.6	62.3	37.7	0.0
CA	32	D	D		99,472	59,860	4,394	163,726	24.2	60.8	36.6	2.7
CA	8	D	D		142,349	92,913	0	235,262	21.0	60.5	39.5	0.0
CA	34	D	D		85,033	56,786	0	141,819	20.0	60.0	40.0	0.0
CA	36	D	D		103,076	78,904	0	181,980	13.2	56.6	43.4	0.0
CA	27	D	D		101,922	83,719	6,443	192,084	9.5	53.1	43.6	3.3
CA	30	D	D		62,837	52,205	5,897	120,939	8.8	52.0	43.2	4.9
CA	38	D	R	+1	71,288	84,131	2,943	158,362	8.1	45.0	53.1	1.9

	DEMOCRATS	REPUBLICANS	OTHERS
TOTAL VOTE	4,210,169	4,288,917	196,664
% OF TOTAL VOTE	48.4%	49.3%	2.3%
% OF DISTRICTS WON	60%	40%	0%

* Source: Secretary of State of California

Office - Supreme Court, U.S.
FILED
MAR 7 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1226

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, et al.,
Petitioners,

v.

THE SECRETARY OF THE STATE OF CALIFORNIA, et al.,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH REMCHO*
KATHLEEN J. PURCELL
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, Suite 800
San Francisco, California 94104
Telephone: 415/398-6230

Attorneys for Respondent Assembly of the State of California

**Counsel of Record*

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BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

1. Whether the three-judge district court abused its discretion in this reapportionment case by refusing to lift its abstention order when (1) the court of appeals had unanimously affirmed the order and petitioners had not sought review in this Court, and (2) the district court properly found that petitioners had not made a good faith effort to resolve state law issues in the state courts.

2. Whether this Court should review the refusal to lift an abstention order when trial on the state law issues is set for May 8, 1985 in the Los Angeles Superior Court.

TABLE OF CONTENTS

	Page
Questions presented	i
Statement of the case	1
Summary of argument	6
Argument	8
I	
This is a classic case for abstention	8
II	
Petitioners did not make a good faith effort to secure a state court decision	9
III	
The claimed conflict with other circuits is illusory	11
A. The offer to abandon pendent state claims	11
B. The responsiveness of the state courts	12
C. Abstention in voting rights cases	14
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

Page

Askew v. Hargrave, 401 U.S. 476 (1971) (per curiam) 5, 7, 12, 14

Assembly v. Deukmejian, 30 Cal.3d 638 (1982) 10

Badham v. Eu, Cal. S.Ct. No. SF24638 5

Badham v. United States District Court for the Northern District of California, 721 F.2d 1170 (9th Cir. 1983) 4

Baggett v. Bullitt, 377 U.S. 360 (1964) 15

Baker v. Carr, 247 F.Supp. 629 (M.D. Tenn. 1965) 16

Bandemer v. Davis, Nos. IP 82-56-C, IP 82-164-C (S.D. Ind. Dec. 13, 1984), app. pndg. No. 85-1244 ..... 7, 16

Bryant v. Whitcomb, 419 F.Supp. 1290 (S.D. Ind. 1970) 16

Carstens v. Lamm, 543 F.Supp. 68 (D. Colo. 1982) ... 15

Cline v. Robb, 548 F.Supp. 128 (E.D. Va. 1982) 15, 16

Connecticut State Federation of Teachers v. Board of Education Members, 538 F.2d 471 (2nd Cir. 1976) .. 12

Dodd v. Barnes, 279 F.Supp. 291 (E.D. Tenn. 1967) ... 16

Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981) 16

Flateau v. Anderson, 537 F.Supp. 257 (S.D.N.Y. 1982) (per curiam) 15

414 Theater Corp. v. Murphy, 499 F.2d 1155 (2d Cir. 1974) 7, 12, 13

Griffin v. School Board of Prince Edward, 377 U.S. 218 (1964) 15

Grivetti v. Illinois State Electoral Board, 335 F.Supp. 779 (N.D. Ill. 1971), aff'd 406 U.S. 913 (1972) 16

Harman v. Forssenius, 380 U.S. 528 (1965) 14, 15

Harrison v. N.A.A.C.P., 360 U.S. 167 (1959) 14

Ince v. Rockefeller, 290 F.Supp. 878 (S.D.N.Y. 1968) 16

In re Pennsylvania Congressional Districts Reapportionment Cases, 567 F.Supp. 1507 (M.D. Pa. 1982) 15

TABLE OF AUTHORITIES CITED

CASES

	Page
Legislature v. Deukmejian, 34 Cal.3d 658 (1983)	4
Lister v. Lucey, 575 F.2d 1325 (7th Cir. 1978)	7, 12, 13
Lucas v. Forty-Fourth General Assembly of the State of Colorado, 377 U.S. 713 (1964)	14
McNeese v. Board of Education, 373 U.S. 668 (1963)	14
Muskegon Theaters, Inc. v. City of Muskegon, 507 F.2d 199 (6th Cir. 1974)	12
Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)	12
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)	2, 6, 9, 12, 13
Reid v. Board of Education of City of New York, 453 F.2d 238 (2nd Cir. 1971)	12
Ryan v. State Board of Education of State of Illinois, 661 F.2d 1130 (7th Cir. 1981)	7, 11, 15
Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979)	12
Scott v. Germano, 381 U.S. 407 (1965) (per curiam)	14
Travis v. King, 552 F.Supp. 554 (D. Ha. 1982)	15
United Home Rentals Inc. v. Texas Real Estate Commission, 716 F.2d 324 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 1712 (1984)	12
Upham v. Seamon, 456 U.S. 37 (1982)	14
Whitcomb v. Chavis, 403 U.S. 124 (1971)	14
White v. Weiser, 412 U.S. 783 (1973)	14
Wisconsin State AFL-CIO v. Elections Bd., 543 F.Supp. 630 (E.D. Wis. 1982)	15
Woodard v. Carteret County, North Carolina, 252 F.Supp. 268 (E.D.N.C. 1966)	16

TABLE OF AUTHORITIES CITED

CASES

Page

Zwickler v. Koota, 389 U.S. 241 (1967) 14, 15

Constitution

United States Constitution:

Article I, Section 34 14

California Constitution:

Article II 1

Article IV, Section 8 3

Article XXI 3

Code

California Election Code, Section 30000 3

No. 84-1226

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, et al.,
Petitioners,

v.

THE SECRETARY OF THE STATE OF CALIFORNIA, et al.,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains numerous inaccuracies and misleading statements.[1] Many of these misstatements, however, are irrelevant to the abstention issue, which is the only question properly before the Court on the Petition for Certiorari.

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[1] In at least one instance, petitioners' factual statements are inconsistent and inaccurate on their face. They say that the congressional districting plan was passed in each house on a party-line vote. Cert. Pet. at 5. That much is true. Petitioners then state that the voting margins in the two houses were the two-thirds necessary to preclude a popular referendum. *Id.* This statement is utterly false. No party has a two-thirds majority of California's legislative houses. A referendum to the California electorate was plainly available on this plan. Cal.Const. Art. II. Petitioners, however, declined to take their case to the people and sought judicial intervention instead.

Therefore, respondent Assembly of the State of California will not in this response attempt to correct the record on all of these matters. Rather, we here present only those facts pertinent to this Court's consideration of the abstention issues raised by the Petition for Certiorari.

On March 8, 1983, petitioners filed their initial complaint challenging California's Congressional reapportionment plan on the grounds that it did not meet federal one person one vote standards. Petitioners further alleged that the plan was a "political gerrymander" and that it violated three separate provisions of the California Constitution: (1) that it was not "essentially different" from a plan previously disapproved in a referendum, (2) that it did not meet state reapportionment criteria, such as contiguity of districts, and (3) that it was passed in violation of legislative procedures required by the California Constitution. *See* App. Cert. Pet. at 6a, 44a.

On March 31, 1983, petitioners added a fourth state law cause of action, claiming that corrections to the plan implemented by the Secretary of State violated California law. *See* App. Cert. Pet. at 37a-38a. Petitioners conceded that the plan as corrected had an overall population deviation of .0538%, but argued that the district court should find the corrections invalid and then hold the uncorrected plan unconstitutional because it would then contain deviations of 3.283%. *See* Cert. Pet. 6, n.4; App. Cert. Pet. at 6a, 37a.

On April 26, 1983, the California Democratic Congressional Delegation filed an action in Los Angeles Superior Court for a declaratory judgment that the plan was properly corrected and violated no other state court requirements. *See* App. Cert. Pet. at 7a.

On June 20, 1983, the three-judge district court abstained on the basis of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). It found that reapportionment was a sensitive area of state policy. App. Cert. Pet. at 39a. And it found that the interpretation of the four state law claims presented was in doubt. *Id.* at 41a-44a. The primary state law issue was whether the Secretary of State had the authority, pursuant to California

Elections Code Section 30000 and previous California precedent, to correct errors in the bill as chaptered. The court noted the parties' widely different interpretations of Section 30000, which had never been construed by the California courts.[2] *Id.* at 43a.

Finally, the district court found abstention appropriate because

> . . . In this case, an issue of state law presents a threshold question which will materially alter the federal constitutional question presented. The plaintiffs have claimed in Count VII of their complaint that the "technical corrections" implemented by the Secretary of State violate the state constitution. A decision on this state law issue will determine whether the three-judge court reviews the reapportionment plan with or without the challenged changes. With the changes the reapportionment plan, according to defendants, has a population deviation of only .0538%—a deviation percentage below that which the Supreme Court has found constitutional. The unchanged, or original plan, in contrast, is more in doubt. Its population deviation of 3.283% comes closer to deviations found constitutionally violative.
>
> App. Cert. Pet. at 40a-41a (footnotes omitted).

On June 28, 1983, after previously receiving extensions of time, the petitioners demurred to the state court complaint and moved for change of venue. The demurrer was overruled except as to the Republican National Committee and the motion for change of venue was denied. The petitioners did not file an answer until September 16, 1983. *See* App. Cert. Pet. at 8a.

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[2] The district court held that the application of Article IV, sec. 8 of the California Constitution (three-reading legislative rule) and of recently added Article XXI (new reapportionment requirements) was also in doubt. It also held that the determination of whether the new plan was "essentially different" from the old was a state law issue of first impression. App. Cert. Pet. at 44a.

On August 10, 1983, the Ninth Circuit heard oral argument on petitioners' appeal and emergency petition for writ of mandamus from the district court's abstention order.

On August 30, 1983, while the Ninth Circuit was considering the appeal, petitioners filed an *amicus curiae* brief in the California Supreme Court in the case of *Legislature v. Deukmejian*, 34 Cal.3d 658 (1983). In that case petitioners specifically asked the California Supreme Court *not* to decide the state law issues which were the basis of the district court's abstention order.[3]

On September 26, 1983, the Ninth Circuit unanimously affirmed the abstention order. *Badham v. United States District Court for the Northern District of California*, 721 F.2d 1170 (9th Cir. 1983), App. Cert. Pet. at 27a-35a.

On September 30, 1983, petitioners made their first attempt to obtain a state court adjudication. They filed with the Supreme Court of California a petition for writ of mandate tendering the state law issues. In that petition they insisted that "the matter be briefed, argued and decided no later than November 1, 1983;" that is, within thirty-one days. *See* App. Cert. Pet. at 8a.

On October 11, 1983, petitioners requested rehearing of the Ninth Circuit decision affirming abstention. *Id.*

On October 27, 1983, the California Supreme Court denied the petition for writ of mandate for three reasons:

> (1) The petition was premature because petitioners' request for rehearing was pending before the Ninth Circuit.
>
> (2) Petitioners' delay between June 10, 1983 and September 30, 1983 in seeking relief in the Supreme Court prevented resolution of disputed factual claims by the November 1, 1983 date specified by petitioners.
>
> (3) The extraordinary relief requested was inappropriate because time constraints might well necessitate use of the

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[3] A copy of petitioners' *amicus curiae* brief in that case was attached as Appendix A to the Assembly's February 12, 1985 response to petitioners' motion to expedite consideration in this Court.

challenged congressional districts for the 1984 elections in any event.

Badham v. Eu, Cal. S.Ct. No. SF24638, Slip Op. (App. Cert. Pet. at 25a-26a).

The denial was "without prejudice to the filing of a subsequent petition seeking relief in an appropriate court at such time as the abstention order becomes final." *Id.* at 26a.

On December 12, 1983, the Ninth Circuit denied the petition for rehearing, noting that petitioners were free to return to the district court in the event of undue delays in the state court. App. Cert. Pet. at 23a-24a.

On that same date, December 12, 1983, petitioners returned to the district court with an application to reassert jurisdiction, a motion for leave to file a second amended complaint, and other motions. *See* App. Cert. Pet. at 9a-10a. They declined the California Supreme Court's invitation to seek resolution of the state law issues in an appropriate state court. Instead the proposed second amended complaint would simply have dropped the pendent state claims from the federal suit. *See id.* at 10a.

On March 11, 1984, the time to file a petition for certiorari to the Ninth Circuit for review of the decision affirming the district court's abstention order passed without action by petitioners.

On June 19, 1984, the district court, one judge dissenting, declined to lift its abstention order and accordingly denied all other motions. App. Cert. Pet. at 14a. After full briefing and argument, the district court specifically found that petitioners had not made a good faith effort to resolve the state law issues as required by the Ninth Circuit's affirmance: "[W]e hold that plaintiffs have not made a good faith effort to obtain a disposition of the state law issues in state court." *Id.*

Citing *Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*) the district court rejected petitioners' argument that their willingness to drop the state claims somehow changed the *Pullman* analysis:

> Abstention is not based on the parties' artful pleading, it rests on the much loftier considerations of comity and sound judicial administration.
>
> *Id.* at 14a.

The district court noted that at the hearing, petitioners "conceded that even when they filed their December application [to reassert jurisdiction], it was already too late to formulate a new plan for the 1984 Congressional elections" and that "[a]ll parties have agreed that relief, if any, could be effective only for the 1986 elections." *Id.*

In order to "ensure that the state proceedings will not be unnecessarily delayed" the court directed the parties to file monthly progress reports with the federal court, identifying all action in the state courts. *Id.* at 15a.

On November 1, 1984, the Ninth Circuit unanimously affirmed the district court. App. Cert. Pet. at 1a-3a.

On January 18, 1985, petitioners filed a motion in the Los Angeles Superior Court to advance trial and for precedence on the calendar. The motion was granted on February 8, 1985 and trial was set on the state law issues for May 8, 1985.

On January 30, 1985, the ninetieth day after the second Ninth Circuit decision affirming the district court, petitioners filed the pending petition for certiorari. The petition was served by ordinary first-class mail from Washington D.C. and was received by the Assembly's attorneys on February 4, 1985. On February 8, 1985, petitioners filed their motion to expedite, which this Court denied by Order entered February 19, 1985.

SUMMARY OF ARGUMENT

The district court's original unanimous decision to abstain was indisputably correct. Each of the four state law issues raised by petitioners in their complaint could either substantially alter or moot the federal claims. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). In its unanimous opinion upholding the district court, the Ninth Circuit gave particular attention to the special problems of voting rights cases. And the petitioners

accepted the decision of the Ninth Circuit by failing to petition this Court for certiorari.

Petitioners subsequent offer to abandon their state law claims did not require the district court to lift the abstention order. Abstention depends on whether dispositive state law grounds exist, not on whether petitioners have raised them. *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*). The state law issues were still present; they were still doubtful; and their resolution could still materially alter or moot the federal claims.

The courts below correctly found that petitioners had not in good faith sought state court adjudication and that sufficient time remained before the 1986 elections for the resolution of state law issues and return to the district court if necessary. App. Cert. Pet. at 14a-15a, 2a-3a. The district court's order requiring monthly status reports demonstrates that court's commitment to assuring timely relief. *Id.* at 15a.

Petitioners' claim of a conflict among the circuits is illusory. The cases from other circuits on which petitioners rely did not present doubtful and potentially dispositive state law issues and for the most part did not discuss abstention. *See* cases cited in Petition for Certiorari at pp. 15-16, n.10 and 11. *See also Bandemer v. Davis*, Nos. IP 82-56-C, IP 82-164-C (S.D.Ind. Dec. 13, 1984), *app. pndg.*, No. 85-1244 (abstention denied without discussion). Those that did deal with abstention are easily distinguished. *See Ryan v. State Board of Education of State of Illinois*, 661 F.2d 1130 (7th Cir. 1981); *Lister v. Lucey*, 575 F.2d 1325 (7th Cir.), *cert. denied*, 439 U.S. 865 (1978); *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974). The facts of this case uniquely call for abstention.

Trial of the state law issues is now set for May 8, 1985 in Los Angeles Superior Court. Even if this Court were to grant the petition for certiorari, petitioners will in all likelihood have a decision on the state law issues by the time this Court calendars the matter for argument.

ARGUMENT

Petitioners advance several reasons for granting the writ. *See* Cert. Pet. at 9 and section headings. These various grounds can, we think, be safely summarized as a claim that because some courts in other circuits have not abstained in voting rights cases, the district court here should have refused to abstain. The Ninth Circuit's decision, petitioners say, therefore creates a conflict which should be resolved by this Court.

But abstention cases are to be decided on the facts relevant to each case. Petitioners mischaracterize the decisions in other circuits and ignore the unique facts of this case.

I

THIS IS A CLASSIC CASE FOR ABSTENTION

In a one person one vote case, the crucial facts are statistics as to population deviations among the districts. If the corrections to the plan implemented by the Secretary of State are valid under California law, then the deviations in California's congressional plan are so small as to be utterly irrelevant. In that event, there would be little to be said against the plan. On the other hand, if the corrections are invalid, the resulting population deviations would surely strengthen a one person one vote claim and dramatically affect judicial considerations.

The state law corrections issue is new; its resolution would substantially modify the facts on which adjudication of the federal claim would be based. And, the area of state law involved is of utmost sensitivity: whether and under what circumstances the California Secretary of State may correct reapportionment legislation.

The presence of three additional state law issues whose resolution would entirely moot both the one person one vote and the gerrymandering claim makes abstention all the more appropriate.

This is a classic case for *Pullman* abstention. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).[4] Indeed, petitioners did not seek review in this Court from the Ninth Circuit's initial abstention decision.

Yet, petitioners now argue that their gerrymandering claim is so important that the federal courts should reach it immediately without waiting for state court review of the state law issues. That argument stands the abstention doctrine on its head. It is precisely the difficulty and novelty of the political gerrymandering claim, as well as its implications for federal-state relations, that counselled the district court not to reach for this issue when potentially dispositive state law issues remained.

II

PETITIONERS DID NOT MAKE A GOOD FAITH EFFORT TO SECURE A STATE COURT DECISION

It is apparent that after June of 1983 petitioners' aim was not to secure invalidation of the plan on state law grounds or even on one person, one vote grounds. Their aim was to participate in making law on political gerrymandering. And while that might be a legitimate goal for these petitioners or for the Republican National Committee, the district court was under no duty to assist them when the message of *Pullman* was so clear.

In their petition for certiorari, petitioners advise this Court that the harm the district court did was that it "remitted them, effectively, to the glacial processes of the Los Angeles County Superior Court." Cert. Pet. at 8. As the Ninth Circuit had already pointed out, however, that was not so. App. Cert. Pet. at

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[4] As we discuss in Section III, when petitioners moved to drop their state law claims from the federal suit, they did not and could not alter the fact that resolution of those claims would still modify the federal issue and possibly moot the entire case. And, notwithstanding petitioners' reliance on Judge Schnacke's dissent (Cert. Pet. at 22), the mere fact that corrected districts had been used in the 1984 elections did not resolve the validity of the corrections under state law. *Compare* App. Cert. Pet. at 5a, n.1 with *id.* at 17a.

2a-3a. Moreover, when petitioners finally decided to seek a trial date in the superior court, trial was set for May 8, 1985, less than four months after petitioners filed their request.

Had petitioners moved the superior court for an expedited trial date in June of 1983, when the district court first abstained, they could have gone to trial in October of 1983.

Petitioners filed no action of their own. They sought to dimiss the action filed by the Congressional Delegation. And they specifically asked the California Supreme Court in a related case *not* to decide the state law issues which could have given them the relief they sought.

When petitioners finally filed their own petition for an extraordinary writ in the California Supreme Court, they gave that court a 31-day deadline for action. When the Court refused to act on such a short timetable, petitioners declined the court's invitation to file in another appropriate California court.[5]

The district court's holding that petitioners failed to make a good faith effort to secure a state decision on the critical and doubtful state law issues was clearly correct. The delay here was of petitioners' making. In no event can the decision to continue abstention be characterized as an abuse of discretion.

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[5] As the California Supreme Court pointed out, it appeared that election scheduling would require use of the plan in the 1984 elections in any event. App. Cert. Pet. at 25a. Moreover, none of the cases cited by petitioners as evidencing the willingness of the California Supreme Court to act quickly involved decisions on the 31-day start to finish deadline insisted upon by petitioners. *See, e.g., Assembly v. Deukmejian*, 30 Cal.3d 638, *cert. denied sub nom. Republican National Committee v. Burton*, 456 U.S. 941 (1982) (filed October, 1981, decided January 28, 1982).

III

THE CLAIMED CONFLICT WITH OTHER CIRCUITS IS ILLUSORY

In this case, four separate state law issues justified the district court's original and continued abstention. The intervening events and supposed special circumstances that petitioners advance neither made abstention an abuse of discretion nor placed the Ninth Circuit in conflict with other circuits.

A. The Offer to Abandon Pendent State Claims

Petitioners argue that by tendering a second amended complaint that did not seek relief on pendent state claims they eliminated the grounds for abstention.[6] But whether petitioners specifically alleged the state law issues or not, decision on those issues could still resolve the case without the need to reach political gerrymandering. If the Los Angeles Superior Court holds the corrections invalid, then petitioners will have a stronger one person one vote claim to bring back to the district court. And if petitioners prevail on any of their other state law grounds they will have won their case.

Petitioners cite *Ryan v. State Board of Elections of State of Illinois*, 661 F.2d 1130 (7th Cir. 1981), where, they assert, the Court of Appeals held that because the parties raised only federal claims the district court "had no authority to abstain." *Id.* at 1135, quoted in Cert. Pet. at 15. Petitioners quote only the first half of the sentence and thus gravely distort the decision in *Ryan*. The Seventh Circuit in fact held that because a three-judge court should have been convened, a single judge, acting alone, "had no authority to abstain . . . ; *only a three-judge panel could make that determination.*" 661 F.2d at 1135 (emphasis added). *Ryan* does not support petitioners' position. Neither does any other case.

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[6] As the district court noted, petitioners' proposed second amended complaint made all the same allegations; it just omitted citations to the California Constitution and statutes. App. Cert. Pet. at 10a.

The established law in other circuits, in the Ninth Circuit, and in decisions of this Court is the same: abstention is appropriate if the *Pullman* criteria are met and potentially dispositive state law issues exist even though the state law claims are not raised in the federal suit. *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 840 (9th Cir. 1979); *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F.2d 471, 483-85 (2nd Cir. 1976); *Muskegon Theaters, Inc. v. City of Muskegon*, 507 F.2d 199, 204 (6th Cir. 1974); *Reid v. Board of Education of City of New York*, 453 F.2d 238, 242 n.7 (2nd Cir. 1971).

Abstention is a matter of basic federal jurisprudence and sound judicial policy. Even if both parties agree not to raise abstention, the court may be under an obligation to raise the doctrine *sua sponte*. *See Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977); *United Home Rentals Inc. v. Texas Real Estate Commission*, 716 F.2d 324, 332 (5th Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1712 (1984). The district court and the Ninth Circuit did not abuse discretion nor conflict with other circuits in applying these principles to this case.

B. The Responsiveness of the State Courts

Petitioners rely on two cases from other circuits for the proposition that after the California Supreme Court denied their petition for extraordinary relief abstention was no longer proper. *Lister v. Lucey*, 575 F.2d 1325 (7th Cir.), *cert. denied*, 439 U.S. 865 (1978) and *414 Theatre Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974) cited in Cert. Pet. at 20-21. Neither case is comparable to the situation here.

In *Lister*, the plaintiffs commenced and vigorously pursued a state court action immediately after the federal district court stayed its hand on grounds of abstention. 575 F.2d at 1329. Both the state trial court and the Wisconsin Supreme Court, however, refused to hear the merits of plaintiffs' claim on the grounds that

they had failed to exhaust state administrative procedures, procedures that all parties conceded were time consuming and burdensome. 575 F.2d at 1329-31. The Wisconsin Supreme Court admitted its inherent authority to reach the merits despite such jurisdictional impediments but declined to do so on the grounds that the issue was not of sufficient public importance. *See* 575 F.2d at 1330, 1332. The federal district court not only refused to lift its stay, it also dismissed the complaint. On these facts the Seventh Circuit held that the district court should not have continued to abstain. 575 F.2d at 1331-32. Six and one-half years after the federal action had commenced, the Seventh Circuit remanded the case to the district court for a decision on the merits.

The instant case lacks all of the features that led to the Seventh Circuit decision in *Lister*. Petitioners have not vigorously pursued state court litigation; they have not been relegated to lengthy or burdensome state administrative proceedings; the state court has not suggested that the issues lack importance; and nothing approaching the time in *Lister* has passed. The state court trial is set for May 8, 1985.

The case of *414 Theatre Corp. v. Murphy, supra,* is no more on point. That case involved *Younger* abstention, not *Pullman* abstention. There, the federal district court had initially stayed its hand " 'in the spirit of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) . . . with full awareness that denial [of a preliminary injuction] was not mandated . . . since no criminal or civil cases involving 414 were pending in the state courts . . . ' " 499 F.2d 1156 (quoting from the district court opinion). The district court reasserted jurisdiction only after the state appellate division reversed a civil injunction on procedural grounds and thereby avoided ruling on the constitutional claim. 499 F.2d at 1157. The Second Circuit affirmed the district court's decision to proceed. Here, of course, it is petitioners themselves, not the state courts that have avoided resolution of the state law issues.

C. Abstention in Voting Rights Cases

Petitioners suggest that there is a conflict among the circuits because courts in other circuits have not abstained in reapportionment cases. They further assert that under this Court's cases the initial abstention order and continued abstention were improper. They are wrong on both counts.

Petitioners' argument that abstention is improper here begins with the claim that "[f]ederal law, not state policy, sets the standard for reviewing congressional redistricting cases." Cert. Pet. at 14. But Article I, § 4 of the United States Constitution provides that in the first instance "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[7]

Petitioners' suggestion that abstention does not apply in voting rights and reapportionment cases is frivolous. *See, e.g., Zwickler v. Koota*, 389 U.S. 241, 242, 248-52 (1967); *Harman v. Forssenius*, 380 U.S. 528, 534-36 (1965); *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713, 716 n.2 (1964). *See also Scott v. Germano, supra*, 381 U.S. at 408-09.[8]

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[7] Because reapportionment is carried out by the states, federal courts are encouraged to defer to the state legislatures and state courts for action whenever possible in reapportionment matters, including those involving congressional districting. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 43 (1982); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971); *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*).

[8] Petitioners rely on several of these decisions for the proposition that in cases involving fundamental rights, the mere prospect of delay forbids abstention. Cert. Pet. at 12-13. But there is no exception to the abstention doctrine for federal constitutional and civil rights cases. *See Askew v. Hargrave, supra*, 401 U.S. at 478; *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-78 (1959). In *McNeese v. Board of Education*, 373 U.S. 668 (1963), on which petitioners rely, this Court simply held that a federal civil rights litigant need not exhaust state administrative remedies and await decision of the "same claim" in state court before obtaining federal adjudication. 373 U.S. at 672. In each of the other

Federal courts throughout the country have abstained in reapportionment actions to allow state courts to adjudicate state law issues.[9] *See, e.g., Cline v. Robb*, 548 F.Supp. 128, 133-34 (E.D.

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cases on which petitioners rely, some established element, necessary for abstention, was missing. Thus in *Baggett v. Bullitt*, 377 U.S. 360, 375-76 (1964), and *Zwickler v. Koota, supra*, 389 U.S. at 249, state court construction was unlikely to moot or modify the federal constitutional issue. In *Griffin v. School Board of Prince Edward*, 377 U.S. 218, 229 (1964), the state courts had already passed on the state law issues; and in *Harman v. Forssenius*, 380 U.S. 528, 535-36 (1965) the state statutes were clear and unambiguous and were unlikely to moot the federal claim.

[9] In support of their contrary argument, petitioners cite a series of district court reapportionment decisions. Cert. Pet. at 15-16 n.10 and 11. However, none of these reported decisions and none of the unpublished opinions that respondents have been able to locate presented a situation comparable to that which led the district court to abstain here. Indeed, in most of these cases the courts did not even discuss abstention and there were no ambiguous and potentially dispositive state law issues that would justify abstention. In *Carstens v. Lamm*, 543 F.Supp. 68, 83 n.38 (D. Colo. 1982), for example, the only reference to state law appears to be the court's use of state constitutional criteria governing state legislative plans in the course of developing a court ordered congressional plan. The court in *In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F.Supp. 1507 (M.D. Pa. 1982), found no federal constitutional violation based on alleged lack of compactness and contiguity and held that the plaintiffs' "remedy lies in the ballot box, not in a federal courthouse." 567 F.Supp. at 1517. In *Flateau v. Anderson*, 537 F.Supp. 257, 262 (S.D.N.Y.) (*per curiam*), *app. dismissed*, 458 U.S. 1123 (1982), the court simply held that federal constitutional requirements superseded a provision of the New York Constitution allowing the legislature six years after the decennial census to enact a reapportionment plan. The state law claim in *Travis v. King*, 552 F.Supp. 554, 556 n.4 (D. Ha. 1982) apparently was identical to the federal one person one vote issue. And while the court in *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F.Supp. 630 (E.D. Wis. 1982) did deny the governor's request that it abstain in order to allow the Wisconsin Supreme Court to act on his original petition regarding reapportionment, there is no indication in that case that the governor's petition raised any state law issues. 543 F.Supp. at 632. In *Ryan v. State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir.

Va. 1982); *Bryant v. Whitcomb*, 419 F.Supp. 1290, 1297-99 (S.D. Ind. 1970); *Grivetti v. Illinois State Electoral Board*, 335 F.Supp. 779, 785-86 (N.D. Ill. 1971), *aff'd mem.*, 406 U.S. 913 (1972); *Ince v. Rockefeller*, 290 F.Supp. 878 (S.D.N.Y. 1968); *Dodd v. Barnes*, 279 F.Supp. 291, 292-94 (E.D. Tenn. 1967); *Woodard v. Carteret County, North Carolina*, 252 F.Supp. 268, 270 (E.D.N.C. 1966); *Baker v. Carr*, 247 F.Supp. 629, 638-39 (M.D. Tenn. 1965). The Fifth Circuit has expressly stated that "[a]n alleged denial of voting rights does not, in itself, constitute a 'special circumstance' which automatically precludes federal court abstention." *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981).

Voting rights cases may raise special election timing considerations that influence the abstention decision. But both the district court and the Ninth Circuit at every stage of these proceedings took proper account of these concerns. *See* App. Cert. Pet. at 3a, 5a, 15a, 31a-34a.

1981), Cert. Pet. at 15, the court discussed abstention, but, as we note *supra*, petitioners completely mischaracterize this case and it, in fact, supports application of the abstention doctrine in the appropriate reapportionment context. *See* 661 F.2d at 1136. Finally, although the complaint in *Bandemer v. Davis*, Nos. IP 82-56-C, IP 82-164-C (S.D.Ind. Dec. 13, 1984), *app. pndg.* No. 85-1244, apparently raised state law issues, the district court's denial of abstention without discussion did not create a conflict among the circuits that would justify this Court's intervention.

CONCLUSION

The district court did not abuse its discretion. There is no conflict among the circuits. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH REMCHO
KATHLEEN J. PURCELL
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street
Suite 800
San Francisco, CA 94104
Telephone: (415) 398-6230
Attorneys for Respondent Assembly of the State of California

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No. 84-1226

In the

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, ROBERT W. NAYLOR, ERIC SEASTRAND, ALDO SILVESTRI, MICHAEL W. COBB, FRANK O. VERLOT, DONNA S. RICHARDSON, PETER SCHRAGER, JANE BAKER, CHARLES A. MEYER, KIRK LINDSEY, DONALD DRISCOLL, AND ROGER T. ERICKSON,

Petitioners,

v.

THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, THE ASSEMBLY OF THE STATE OF CALIFORNIA, THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE MEMBERS OF THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

IRELL & MANELLA
RICHARD H. BOROW, P.C.
*JONATHAN H. STEINBERG
DONNA R. HECHT
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067

Telephone: (213) 277-1010

Attorneys for Respondents the Members of the California Democratic Congressional Delegation

March 6, 1985

* Counsel of Record

BEST AVAILABLE COPY

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QUESTION PRESENTED

Did the district court abuse its discretion by continuing to abstain under the particular circumstances of this case, including the following: 1) the petitioners alleged a novel federal constitutional claim of partisan gerrymandering, 2) a ruling on the several unclear state constitutional claims petitioners had additionally alleged could alter or obviate their federal constitutional claim, 3) the petitioners could have resolved the state law issues in the state courts in ample time to return to federal court if necessary and resolve the federal law issues before the 1986 elections, 4) the district court agreed to reassert jurisdiction if, despite petitioners' best efforts, they could not obtain a timely state court ruling, and 5) petitioners had failed effectively to litigate in state court following the district court's initial decision to abstain?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. THERE IS NO CONGRESSIONAL REDISTRICTING EXCEPTION TO THE *PULLMAN* DOCTRINE	13
II. THE REPUBLICANS CANNOT SHOW THAT DELAY RESULTING FROM ABSTENTION IMPAIRED THEIR ABILITY TO PROTECT THEIR ALLEGED FEDERAL CONSTITUTIONAL RIGHTS	15
A. The Possibility of Delay Does Not Preclude Abstention	16
B. The Republicans, and Not the Courts of California, Are Responsible for the Lack of a Ruling on Their State Law Claims	19
1. After Abstention, the Federal Plaintiff Has the Burden of Seeking a Ruling on the State Law Issues	20
2. The California Supreme Court's Denial, Without Prejudice, of the Republicans' Tardy Petition Is Not a Basis to Retake Jurisdiction	21
3. Despite the Republicans' Delay, the Superior Court Is Set to Rule in Time for the 1986 Elections, Thus Mooting All Abstention Issues	25
III. CONCLUSION	28

TABLE OF AUTHORITIES

Cases

	Page
Anderson v. Redman, 480 F. Supp. 830 (D. Del. 1979)	21
Ashwander v. TVA, 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688 (1936)	10
Baggett v. Bullitt, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964)	18
Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)	15
Bryant v. Whitcomb, 419 F. Supp. 1290 (S.D. Ind. 1970)	14
Canton v. Spokane School Dist. No. 81, 498 F.2d 840 (9th Cir. 1974)	17
Cline v. Robb, 548 F. Supp. 128 (E.D. Va. 1982)	14
C-Y Development Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983)	13, 14
Dodd v. Barnes, 279 F. Supp. 291 (E.D. Tenn. 1967)	14
Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. granted*, 455 U.S. 937, 102 S. Ct. 1426, 71 L. Ed. 2d 647, *cert. dismissed*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982)	18
414 Theater Corp. v. Murphy, 499 F.2d 1155 (2d Cir. 1974)	25
Garfinkle v. Wells Fargo Bank, 483 F.2d 1074 (9th Cir. 1973)	21
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 69 S. Ct. 535, 93 L. Ed. 672 (1949)	12
Griffin v. County School Board of Prince Edward Co., 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964)	18
Grivetti v. Illinois State Electoral Bd., 335 F. Supp. 779 (N.D. Ill. 1971), *aff'd*, 406 U.S. 913, 92 S. Ct. 1772, 32 L. Ed. 2d 113 (1972)	14
Harman v. Forssenius, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965)	18
Harris County Commissioners Court v. Moore, 420 U.S. 77, 95 S. Ct. 870, 43 L. Ed. 2d 32 (1975)	14, 17
Ince v. Rockefeller, 290 F. Supp. 878 (S.D.N.Y. 1968)	14
Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972)	16, 21
Legislature v. Reinecke, 6 Cal. 3d 595, 99 Cal. Rptr. 481, 492 P.2d 385 (1972)	23

TABLE OF AUTHORITIES (continued)

Cases

	Page
Lister v. Lucey, 575 F.2d 1375 (7th Cir.), *cert. denied*, 439 U.S. 865, 99 S. Ct. 190, 58 L. Ed. 2d 175 (1978)	24, 25
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941)	passim
Reetz v. Bozanich, 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970)	17
Romero v. Coldwell, 455 F.2d 1163 (5th Cir. 1972)	18
Silver v. Brown, 63 Cal. 2d 270, 46 Cal. Rptr. 308, 405 P.2d 132 (1965)	14
Silverman v. Browning, 359 F. Supp. 173 (D. Conn. 1972), *aff'd*, 411 U.S. 941, 93 S. Ct. 1927, 36 L. Ed. 2d 406 (1973)	21
Upham v. Seamon, 456 U.S. 37, 102 S. Ct. 1518, 71 L. Ed. 2d 725 (1982)	15
Waldron v. McAtee, 723 F.2d 1348 (7th Cir. 1983)	21
Warren v. Government National Mortgage Ass'n, 443 F.2d 624 (8th Cir.), *cert. denied*, 404 U.S. 886, 92 S. Ct. 220, 30 L. Ed. 2d 169 (1971)	20
White v. Weiser, 412 U.S. 783, 93 S. Ct. 2348, 37 L. Ed. 2d 335 (1973)	15
Woodard v. Carteret County, North Carolina, 252 F. Supp. 268 (E.D.N.C. 1966)	14
Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967)	17

Statutes

28 U.S.C. § 2284	3
Cal. Code Civ. Proc. § 1062.3(a)	27
Cal. Rules of Ct. 209	9
Cal. Rules of Ct. 210	9
Cal. Rules of Ct. 217	9
Cal. Rules of Ct. 375(b)	27

Other Authorities

6 B.E. Witkin, *California Procedure*, Appeal § 483	27

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BRIEF OF RESPONDENTS THE MEMBERS OF THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The abstention order which petitioners challenge was interlocutory and the district court has made no findings as to any of the purported "facts" regarding California's present redistricting plan on which petitioners rely.

Respondents dispute these facts; but the proper battleground for this dispute is the trial court.[1] At this stage, the only facts in this case are procedural.

However, as background, respondents agree that following the 1980 census, the California Legislature enacted a Congressional redistricting bill, A.B.301. In June, 1982, however, the voters invalidated A.B.301 in a referendum. The Legislature, sensitive to the constitutional urgency of redistricting, then replaced the rejected A.B.301 by enacting a new Congressional redistricting bill, A.B.2X.[2]

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[1] The Republicans blithely ask this Court to assume that the redistricting plan at issue is indeed a political gerrymander. It is untrue that this has been "cynically acknowledged" by anyone, *cf.* Cert. Pet. at 3; rather, it is hotly contested.

While a full reply on this claim is well beyond the scope of this brief and the question presented, two points deserve passing mention. First, aside from pointing to irregularly shaped districts, the Republicans' principal "proof" of gerrymandering is the fact that they were unable to win a statewide percentage of seats proportional to the share of votes cast for various Republican candidates. But there is nothing novel about this lack of proportionality. Indeed, in 1967, then-Governor Reagan signed a bi-partisan redistricting plan that in 1968 gave Republicans only a 44.7% minority of the Congressional seats for a 55.3% majority of the cumulative two-party vote. Was Ronald Reagan a Democratic gerrymanderer? Second, the Republicans have insisted that the "grotesque" shape of district 38 (Appx. to Pet. at 49a), like that of the other districts depicted in the color maps presented to this Court, betokens a plan that will establish impregnable Democratic strongholds until the end of the decade unless the federal courts promptly intervene on their behalf to redraw such districts. But in the only serious Congressional challenge they mounted in 1984, the Republicans captured the district, which is now represented by a conservative Republican, Robert Dornan. *See* "Semi-Official Results", Appx. to Pet. at 52a-53a.

[2] The Republicans state that because A.B.2X passed by a two-thirds vote, they were prevented from challenging it by referendum as they had A.B.301. Cert. Pet. at 5. The claim is obviously false. As they make clear on the preceding page of their brief, A.B.2X did *not* pass by a two-thirds vote. It was the Republicans' *own* decision to forego this settled political remedy in favor of the present judicial experiment.

On March 8, 1983, petitioners, a group of Republican politicians and activists (hereafter the "Republicans") filed a complaint in the district court against the Secretary of State of California (the "Secretary"). The case was assigned to Judge Schnacke, and two additional judges were appointed to constitute a three-judge court pursuant to 28 U.S.C. § 2284. The complaint as amended on March 31, 1983 mounted multiple state and federal attacks on the validity of A.B.2X. As a matter of state law, it alleged that A.B.2X: 1) had not been read three times in both houses of the Legislature before passage, in violation of article IV, § 8 of the California Constitution; 2) essentially reenacted A.B.301 despite the latter's referendum defeat, in violation of article II, § 9 of the California Constitution; and 3) created discontiguous districts and split too many cities and counties across districts, in violation of article XXI of the California Constitution. As a matter of federal law, it alleged that A.B.2X: 1) created excessive population deviations among districts, in violation of the "one person, one vote" rule, and 2) invidiously discriminated against persons who tended to vote for Republican candidates. Finally, it alleged a deadline of December 15, 1983 by which the precinct lines for the 1984 elections had to be fixed.

The Republicans faced a serious initial hurdle to their population deviation claim. Although the language of A.B.2X as chaptered contained certain technical errors which, when read literally, created a population deviation of 3.083%, state officials had corrected these errors before the bill was implemented. As implemented, the bill had a remarkably small total deviation of 0.0538%. To secure a more plausible target for their population equality challenge, the Republicans further alleged that the *corrections* were unlawful, both under state law and under federal due process and equal protection principles, and that, once stripped of its corrections, the bill would have an excessive

population deviation. On April 21, 1983, the Republicans accordingly moved for partial summary judgment that the corrections had to be undone.

On April 7, 1983, the Assembly of the State of California (the "Assembly") had intervened as a defendant; on April 26, 1983, the members of the California Democratic Congressional Delegation (the "Delegation") intervened similarly and moved to stay the action under the *Pullman* abstention doctrine. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The Delegation noted that all the traditional prerequisites of abstention existed: resolution of the state law issues could alter or obviate the federal constitutional questions; the state law issues were unclear; and the action dealt with redistricting, a sensitive area of state social policy. Also on April 26, 1983, the Delegation filed a complaint in the Los Angeles Superior Court for a declaratory judgment that A.B.2X was valid under state law and that the Republicans' state law claims were unfounded. The parties to the state action were essentially the same as in the federal action.[3]

On June 20, 1983, the three-judge district court issued its opinion abstaining unanimously.[4] It found that redistricting was indeed a sensitive area of state social policy. It noted that a state court ruling could indeed alter or obviate the federal constitutional question; "[i]f A.B.2X is found invalid because it violates the California Constitution . . ., the federal constitutional questions will become moot." 568 F. Supp. at 159. Finally, it found that the potentially determinative state law issues were indeed doubtful. Thus, it held, "[t]he rationale of *Pullman* applies most persuasively here." *Id.* at 161.

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[3] The defendants are the Secretary and the Republicans. The Assembly is not a party to the state action.

[4] It had announced orally on June 10 that it intended to abstain.

The Republicans determined to try to overturn the abstention order on appeal, and to delay the state court action until they could accomplish this. Although served with the state court complaint on May 16, 1983, the Republicans did not respond to it until June 28, 1983; even then, they did not answer, but instead filed a demurrer and a motion to change venue. On June 29, 1983, they filed a petition for writ of mandamus in the court of appeals for the Ninth Circuit.[5] They argued in part that litigation in the state courts meant "intolerable delays". At the Republicans' request, the court of appeals set an expedited schedule for briefing and oral argument. Meanwhile, on August 17, 1983, the Superior Court overruled the Republicans' demurrer and denied their motion to change venue. The Republicans filed an answer on the very last day permitted, September 16, 1983. By comparison, the Secretary of State had answered the complaint on May 25, 1983.

On September 26, 1983, the Ninth Circuit unanimously affirmed the district court's decision to abstain. In an opinion by Judge Wallace, it held that the requirements for abstention were met, "[e]ssentially for the reasons stated by the district court." 721 F.2d at 1172. The court of appeals rejected the Republicans' argument that "*Pullman* abstention is not appropriate in a voting rights case," but held that "abstention orders in cases involving voting rights require special consideration." *Id.*

> [B]efore abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote ....
>
> It may not be necessary to refuse to abstain in order to mitigate the dangers of delay. Instead, the district court

[5] On July 19, 1983, after the Delegation had pointed out that the abstention order was probably appealable, the Republicans also filed a timely notice of appeal.

> may fashion its order in a way to reduce those dangers. The district court has done so in this case. . . . [It] stated that the Republicans could return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in the state courts.

Id. at 1173-74. The court of appeals declined at that time to address the Delegation's argument that the Republicans had brought delay upon themselves. It declared:

> The argument is premature. Clearly, the district court's permission for the parties to return to federal court if necessary is predicated on a good faith effort to obtain a disposition of the state law issues in state court. Thus, if the Republicans later seek to obtain a ruling by the district court prior to action by the state courts, the district court must examine any allegations that the Republicans have not acted in good faith, especially during the time period following its absention order.

Id. at 1174. It held that:

> The district court's abstention will have no immediate significant effect on federal voting rights. The deadline is December 15, 1983 — six months after the abstention order. Therefore, as the matter presently stands, there is no immediate need for federal intervention.

Id.

On September 30, 1983, nearly one-third of a year after the abstention order was first announced, the Republicans filed a petition for writ of mandate in the Supreme Court of California, asking it to exercise its discretionary original jurisdiction to resolve the state law issues. They demanded that it do so by November 1, 1983, realleging that the district lines had to be made certain by December 15, 1983. The Delegation filed a brief supporting their petition. Meanwhile, on October 11, 1983, the Republicans petitioned for a rehearing in the court of appeals. The petition for

rehearing was denied on December 12, 1983. The Republicans did not seek further review in this Court.

On October 27, 1983, the California Supreme Court denied the Republicans' petition. The grounds for its denial are significant. First, it found that:

> Petitioners' delay between June 10, 1983, and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an opinion by the November 1, 1983 date specified by petitioners.

Appx. to Pet. at 25a. Second, it held that:

> The relief requested is in any event inappropriate since, regardless of how the state law issues are resolved, time constraints might well necessitate use of the challenged congressional districts for the 1984 primary and general elections.

Id. It specified that its denial was without prejudice to any subsequent petition. *Id.* at 26a.

On December 12, 1983, the Republicans filed three motions in the district court. The first asked the court to vacate the abstention order. The second sought leave to amend the complaint. Their proposed amended complaint deleted the "one person, one vote" claims but left the partisan gerrymandering claim. It also deleted the state law claims, at least as an independent basis for relief; however, it retained the underlying allegations of these claims, that A.B.2X had not been read three times, created discontiguous districts and split too many cities and counties, and was excessively similar to A.B.301, all now allegedly evidence of gerrymandering. The third motion sought a preliminary injunction against the use of A.B.2X in the upcoming elections on grounds of gerrymandering.

These motions were filed *three days* before the Republicans' own December 15 deadline for any new districting. A hearing on the motion to vacate the abstention order was held on April 13, 1984. In it, counsel for the Republicans admitted that when they filed their motions, it was already too late to use a new plan in the scheduled 1984 elections. Appx. to Pet. at 14a.

After the hearing, on June 19, 1984, the district court held that it would continue to abstain:

> because [the Republicans] have not sought a resolution of the state law claims in good faith; they have not been refused such adjudication by any state court; the case still calls for resolution of the state law claims, if reasonably possible; and because continued abstention does not present any danger to [the Republicans'] voting rights which our reassertion of jurisdiction at this time might prevent.

Appx. to Pet. at 5a (footnote omitted). The court found that the Republicans "ha[d] not made a good faith effort to obtain a disposition of the state law issues in state court." *Id.* at 14a. Rather, they had "actively delayed" the Los Angeles Superior Court action. *Id.* at 12a. The California Supreme Court's denial of their petition was "understandable", but "expressly keeps the state courts open" to the Republicans. *Id.* at 13a. The court found that "the action in Los Angeles Superior Court provides plaintiffs with a sufficient opportunity to obtain a ruling on the state law issues." *Id.* at 14a. Nevertheless, "[t]o ensure that the state proceeding will not be unnecessarily delayed," the district court ordered the parties to file monthly reports on the status of the matter in the state courts. *Id.* at 15a. Judge Schnacke dissented.

On June 28, 1984, the Republicans again challenged abstention in the court of appeals, filing a notice of appeal

and simultaneous petition for writ of mandamus. In their briefs, they still disparaged the state court, labeling it a quagmire of congestion and delay. The court of appeals again granted expedited consideration, setting a hearing for September 13, 1984. On November 1, 1984, the court of appeals issued its memorandum opinion affirming continued abstention. It held:

> We are not satisfied that the Republicans have effectively pursued their claim in state court .... There is an insufficient showing by the Republicans that they cannot resolve the state issues in the state court early enough so that, if unsuccessful, they will be able to resolve their federal claims in the federal court in time for any required redistricting prior to the 1986 elections.

Appx. to Pet. at 2a.

On January 15, 1985, over a year and seven months after the original abstention order, the Republicans filed an "at-issue memorandum" in state court.[6] On January 18, 1985, they moved in the state court for an early trial date, and the Delegation joined and emphatically supported this motion. Their motion was heard and granted on February 8, 1985; the state court set a trial date of May 8, 1985.

On January 30, 1985, the Republicans filed the Petition for Certiorari. On February 8, 1985, they filed a motion to expedite, saying that "the only way to obtain relief in time for the 1986 election cycle is for this court to give the case expedited consideration," Motn. to Expedite at § 5, but failing to mention the hearing that same day on their ultimately successful motion for an early trial date in state court. This Court denied the motion to expedite.

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[6] An at-issue memorandum must be filed before a case can be set for trial. Cases come up for trial-setting in the order that their at-issue memoranda were filed. Cal. Rules of Ct. 209, 210, 217.

SUMMARY OF ARGUMENT

This case is unworthy of this Court's certiorari jurisdiction. It involves no novel legal issue and no conflict among the lower courts. It requires only the application of settled legal principles to facts peculiar to this case. Even more importantly, it stands likely to be mooted before the Court could even hear oral argument.

This case is a preeminent candidate for abstention, meeting all the traditional requirements of *Pullman*. The Republicans do not appear to contest this. Instead, they hypothesize new requirements, arguing that federal courts can never abstain in congressional redistricting cases; that even if they can, they should not have done so here due to the prospect of delay in the California courts; and that even if they should, they should cease abstention once the federal plaintiffs make even a hopeless feint at seeking a state court adjudication. These arguments rest shakily atop fundamental misconceptions regarding the abstention doctrine.

A federal court should abstain whenever a federal constitutional question could be altered or obviated by a ruling on an unclear issue of state law. This rule fosters two fundamental policies. First, the federal courts are to avoid unnecessary constitutional adjudications. *See Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Second, comity and federalism demand that the state courts, not the federal courts, determine unclear issues of state law, particularly where the determination implicates a sensitive area of state social policy. Here, the sensitive area of state social policy is redistricting. The unnecessary federal constitutional adjudication is whether A.B.2X is void as a partisan gerrymander, which subsumes thorny threshold adjudications of whether gerrymandering is justiciable and unconstitutional, and what judicially manageable standards a federal court might apply to such

a claim. The unclear state law issues which could alter or obviate the federal constitutional question are the Republicans' state law challenges to A.B.2X.

It is impossible to carve out an exception in this analysis for Congressional redistricting cases. Every *Pullman* abstention case involves some federal constitutional question, governed by federal standards. Nevertheless, abstention demands that such cases be decided on state law grounds if possible. Federal courts have abstained in state legislative redistricting cases; any distinction between these and Congressional redistricting cases is illusory.

Neither can the Republicans assert a delay exception. They point to dicta from decisions of this Court, in which the Court alluded to the undesirable effects of delay in particular cases. In these cases, however, the Court ultimately held that some traditional prerequisite of abstention was missing. The courts that showed the deepest concerns about delay were the lower courts in this very case. In abstaining, the district court announced that it would reassert jurisdiction if at any time abstention imperiled the Republicans' federal rights; the court of appeals affirmed expressly in reliance on this announcement. While there can be no dispute that the federal courts should be mindful of the delay abstention may entail, there should also be no dispute that the courts in this case were particularly mindful of it.

The critical factor, however is that the Republicans' complaints about delay ring hollow in light of the facts. Never, not at any moment in this case, has abstention prevented them from obtaining a timely ruling on both their state and federal claims. The Republicans themselves, not the district court nor the courts of California, are at fault. They took virtually no action in state court. Rather, as the court of appeals, the district court, and indeed the California Supreme Court found, the Republicans failed to

pursue their claims effectively in state court. The Republicans' argument that they have "discharged" their duty to litigate in state court flies in the face of this factual finding, a finding which under the "two-court rule" is virtually binding on this Court. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The facts show that on June 10, 1983, the district court announced it would abstain. At that point, the state declaratory relief action was pending and the Republicans could have pursued their claims in it. They had previously filed a motion in the district court for partial summary judgment; they could have merely changed the caption and refiled it in state court. They could moreover have filed an at-issue memorandum and moved for an early trial. From their success when they ultimately did so, it is likely that they could have had a trial in the fall of 1983. At that trial, the state court could have invalidated A.B.2X on state grounds, in which event the Republicans would have had no more need for relief.[7] Or, if it did not, they could have returned swiftly to argue their federal claims in federal court. Throughout, the district court stood ready to reassert jurisdiction should the state proceedings, despite the Republicans' best efforts, move too slowly.

What did the Republicans actually do in state court? They actively delayed the proceedings through meritless motions to dismiss and to change venue. They shied away from testing the state courts by moving for an early trial, preferring to tell the court of appeals that the state courts were a vast quagmire, rivaling the English equity courts in Dickens' *Bleak House*. On September 30, 1983, they filed

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[7] Relief, of course, is not what the Republican want; they want a test case on partisan gerrymandering. Their petition is artfully phrased. It never says that abstention kept them from getting relief; rather, it says that abstention kept them from testing their novel partisan gerrymandering claim. *See* Cert. Pet. at 11.

a belated and foredoomed petition in the California Supreme Court. Once this petition was denied, they did nothing further. Thus, it is no surprise that the 1984 elections took place in the A.B.2X districts. It is grossly unfair for the Republicans to blame this outcome on the lower courts; the blame lies at their own door.

Since abstention was proper in June of 1983, when the next Congressional election was 12 months away, a fortiori it is proper now, with the next election 15 months away. To believe that the Republicans cannot obtain relief in that time is to assume the district court did not mean it when it said it would retake jurisdiction should the state courts move too slowly. In any case, the state trial now set for May stands to moot the abstention question long before any election. There is no need for this Court to intervene.

ARGUMENT

I.

THERE IS NO CONGRESSIONAL REDISTRICTING EXCEPTION TO THE *PULLMAN* DOCTRINE

The Republicans argue that abstention is impermissible in a case challenging the constitutionality of Congressional districts, because federal law controls such voting rights cases. However, every *Pullman* abstention case, by definition, involves a federal constitutional question. In *Pullman* itself, the question was racial discrimination; here it is alleged discrimination against persons who tend to vote for Republicans. Although one lower court discerned in this Court "a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, racial equality, and first amendment rights of expression . . .," *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983) (citations omitted), any flat civil rights exception to abstention would swallow up the abstention doctrine entirely. Thus, as even the court in *C-Y* concluded,

"there is no *per se* civil rights exception to the abstention doctrine." *Id.*

Neither is there any voting rights exception. In *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975), the Court required abstention in a case that challenged redistricting of justice of the peace precincts, on grounds including one person, one vote principles and racial gerrymandering. It did so even though the district court had already held the redistricting unconstitutional. The Republicans certainly cannot contend that abstention is improper in state and local redistricting cases. Federal courts have found no impediment to applying *Pullman* in such cases. *See, e.g., Cline v. Robb,* 548 F. Supp. 128, 133 (E.D. Va. 1982); *Bryant v. Whitcomb,* 419 F. Supp. 1290, 1298-99 (S.D. Ind. 1970); *Ince v. Rockefeller,* 290 F. Supp. 878, 885 (S.D.N.Y. 1968); *Dodd v. Barnes,* 279 F. Supp. 291 (E.D. Tenn. 1967); *Woodard v. Carteret County, North Carolina,* 252 F. Supp. 268 (E.D.N.C. 1966); *see also Grivetti v. Illinois State Electoral Bd.,* 335 F. Supp. 779, 785-86 (N.D. Ill. 1971), *aff'd,* 406 U.S. 913 (1972); *see generally Silver v. Brown,* 63 Cal. 2d 270, 275 (1965). As the court noted in abstaining in *Ince v. Rockefeller, supra,* 290 F. Supp. at 885-86, "the Supreme Court [has] observed that the power of a state judiciary to manage the apportionment process ha[s] not only been specifically recognized but ha[s] also been 'specifically encouraged' . . . ."

The Republicans appear to believe that special rules apply to abstention in cases involving Congressional redistricting. Yet they fail to propose any legal analysis to distinguish state legislative districts from Congressional districts in the abstention context. The Republicans' observation that "federal law . . . sets the standard" for Congressional redistricting is unhelpful. Federal law controls

state legislative redistricting just as much as it does Congressional redistricting. *Baker v. Carr,* 369 U.S. 186 (1962), the forebear of all reapportionment cases, was a state legislative redistricting case. Moreover, the considerations of comity that support abstention in state legislative redistricting are equally strong when the state is drawing Congressional districts. This Court recently reaffirmed these principles:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.

Upham v. Seamon, 456 U.S. 37, 41 (1982) (quoting *White v. Weiser,* 412 U.S. 783, 795 (1973)). The relevant considerations cannot turn on whether the state's representative is being sent to Sacramento or to Washington, D.C.; in either case, districting concerns the way the state elects its representatives. There is no basis for the Republicans' contention that Congressional redistricting is an exception to abstention.

II.

THE REPUBLICANS CANNOT SHOW THAT DELAY RESULTING FROM ABSTENTION IMPAIRED THEIR ABILITY TO PROTECT THEIR ALLEGED FEDERAL CONSTITUTIONAL RIGHTS

Abstention depends on a three-way partnership between the federal courts, the state courts, and the litigants. When the federal court abstains, it is relying on the state courts to decide the state issues quickly enough to protect the claimed federal right. It is likewise relying on the litigants; it assumes that the federal plaintiff will press for a ruling

on the state issues and that the federal defendant will not obstruct such a ruling.

This reliance is not an empty expression of hope, because the federal court can impose sanctions on its partners if they fail in their duties. If the state court balks, the federal court can retake jurisdiction; comity and deference to the state court are no longer required. Similarly, if the federal defendant obstructs the state court proceeding, the federal court may retake jurisdiction. Finally, a substantial body of authority holds that the federal plaintiff, not the federal defendant, has the burden of pressing the state court litigation. If the federal plaintiff does not litigate in good faith in the state court, the sanction works in reverse: the federal court can refuse to retake jurisdiction, and can even dismiss the remaining federal issues for lack of prosecution.

The district court has upheld its end of the bargain. It ordered the parties to report to it periodically on the progress of the state court litigation, promising to retake jurisdiction if the state courts should ever reject the Republicans' good-faith efforts to get a ruling. The federal defendants have upheld their end, by backing the Republicans' petition to the California Supreme Court, by joining their motion for an early trial, and by refraining from any act in the state courts that even the Republicans could construe as delay or obstruction. Now the Republicans must uphold their end of the bargain, by going forward in the state court.

A. The Possibility of Delay Does Not Preclude Abstention.

The federal courts should indeed be alert to the potential for delay that inheres in every abstention decision. The possibility of delay is one reason why abstention is justified only in those "special circumstances" when all the prerequisites of abstention exist. *Lake Carriers' Ass'n v.*

MacMullan, 406 U.S. 498, 509 (1972); *see Canton v. Spokane School District No. 81,* 498 F.2d 840, 845 (9th Cir. 1974). The Republicans, however, absurdly overextend this simple truth when they argue that "[t]he mere prospect of delay of adjudication of fundamental rights is sufficient to make abstention improper." Cert. Pet. at 12.[8]

The cases are legion in which federal courts abstained despite an allegation of ongoing or imminent violations of federal constitutional rights. *See, e.g., Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975) (ongoing voting rights equal protection violation found by district court); *Reetz v. Bozanich,* 397 U.S. 82 (1970) (ongoing equal protection violation found by district court). In *Pullman* itself, this Court required abstention even though the plaintiffs there alleged what the Court called "undoubtedly . . . a substantial constitutional issue," 312 U.S. at 498: ongoing racial discrimination against black Pullman porters.

In support of their proposed exception to *Pullman,* the Republicans have cited a number of cases in which a court denied abstention while adding that delay could adversely affect certain civil rights. But in each case, the court also found one of the traditional bases for abstention absent. *Zwickler v. Koota,* 389 U.S. 241, 249-50 (1967) (state law

[8] The Republicans' delay argument is merely their first argument — that there can never be abstention in a Congressional redistricting case — in disguise. Here, the district court ruled it would continue to abstain on June 19, 1984. At that point, the primary election had just been held and the next was not due until June, 1986. Since Congressional elections are held every two years, this was as far in advance of a Congressional election as a court could possibly abstain. Nevertheless, the Republicans claim that abstention was improper because it "ensure[d] that the congressional elections of 1986 and perhaps even those of 1988, will be held without [A.B.2X] ever having been tested for its constitutionality." Cert. Pet. at 11. Obviously in their view the next Congressional election is always imperiled by abstention; hence, abstention in a Congressional redistricting case can never be proper.

could not be construed to avoid or modify the constitutional question); *Harman v. Forssenius,* 380 U.S. 528, 535 (1965) (state law not doubtful); *Baggett v. Bullitt,* 377 U.S. 360, 375-78 (1964) (state law could not be construed to avoid or modify constitutional question); *Griffin v. County School Board of Prince Edward Co.,* 377 U.S. 218, 227-29 (1964) (state court had already passed on state law issues); *Duncan v. Poythress,* 657 F.2d 691, 698 (5th Cir. 1981) (state law not doubtful), *cert. granted, 455 U.S. 937, cert. dismissed,* 459 U.S. 1012 (1982); *see also Romero v. Coldwell,* 455 F.2d 1163, 1166 (5th Cir. 1972) (so reading *Harman*). Perhaps the court that has gone the farthest toward creating a delay exception was the court of appeals in this case. Bending over backwards in favor of the Republicans, it held that "before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote." 721 F.2d at 1173. It nevertheless found abstention proper here.

The Court enunciated the correct standard for resolving claims of delay in abstention cases over four decades ago, in *Pullman* itself. There it examined state law and found that an action could be brought in the state courts to resolve the state law issues. It concluded:

> In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.

312 U.S. at 501. Thus, the delay inherent in awaiting a state court ruling may counsel against abstention, but the burden is on the federal plaintiff to show that a state court ruling "cannot be pursued with full protection of the constitutional claim." The Republicans have never made this showing. They cannot make it; the courts of California

have offered them every opportunity to receive a prompt adjudication. As will be discussed below, the Republicans spurned the offer.

B. The Republicans, and Not the Courts of California, Are Responsible for the Lack of a Ruling on Their State Law Claims.

It is the Republicans, not the federal or state courts, who are derelict in their duties. The state courts have not ruled only because the Republicans have not fairly asked them to rule. Instead, they have been unalterably determined to avoid the courts of California, preferring to force a test case about partisan gerrymandering. Since April, 1983, they have been parties to the Superior Court action, which presents their state claims; rather than litigate it with the vigor they have displayed in federal court, the Republicans instead tried to have the action dismissed, and tried to delay it by moving to change venue. Their litigation in the California Supreme Court was more apparent than real. They should have known their petition to that court would be fruitless. They waited almost four months after the abstention order, and then demanded that the California Supreme Court make up the time they had wasted by ruling within an unprecedented one month. It is hardly surprising that the California Supreme Court found that the Republicans' own delay had foreclosed effective relief. The Republicans also might be excused from their duty if the Delegation or the Secretary had used unfair tactics to stall the state court action. However, the Republicans have never even suggested that they have been the victims of such tactics.

The district court's order is the perfect response to the situation. It has promised to monitor closely the progress of the state court action, ensuring that it will be able to retake jurisdiction promptly should the California courts fail to respect the exigencies of voting rights cases. In fact, the

judges of California share the concern of their federal brethren for the Bill of Rights, and will act promptly when it is implicated — if they are asked to.

The state court has set a May 8, 1985 trial date. The 1986 elections are on the distant horizon. The Republicans ask this Court to assume not only that the state courts will mistreat them, but that the district court will then break its promise to reassert jurisdiction if they have litigated diligently. This Court should decline their invitation.

1. After Abstention, the Federal Plaintiff Has the Burden of Seeking a Ruling on the State Law Issues.

As a matter of logic and common sense, one would assume that because the Republicans are the parties seeking to alter the status quo, they have the burden of going forward in any legal proceeding in this controversy. More, however, than logic and common sense compels this conclusion. Federal courts at all levels, including this Court, have recognized this allocation of burden.

Warren v. Government National Mortgage Ass'n, 443 F.2d 624 (8th Cir.), *cert. denied*, 404 U.S. 886 (1971), sets forth the basic rule. In that case, the plaintiff claimed that a state foreclosure statute was unconstitutional. The district court held that abstention was proper to allow the state court to interpret its own statute and state constitution. The court of appeals affirmed abstention. In its opinion, the court ordered:

> *Plaintiff* shall within a reasonable time institute appropriate state litigation to determine the validity of the challenged sale. If *plaintiff* fails to commence such litigation within a reasonable time *or if such litigation is commenced but not prosecuted with reasonable diligence,* the trial court may make such further order as may be appropriate.

443 F.2d at 626-27 (emphasis added). *Warren* is supported by a rather imposing body of authority. *E.g., Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 512-13 (1972) (Court remanded "with directions to retain jurisdiction pending institution by appellants [plaintiffs] of appropriate proceedings in the Michigan courts"); *Garfinkle v. Wells Fargo Bank,* 483 F.2d 1074, 1078 (9th Cir. 1973) ("Appellants [plaintiffs] are directed to institute an appropriate action in the state court to resolve the issues presented . . . and prosecute such action with reasonable diligence"); *see also Waldron v. McAtee,* 723 F.2d 1348, 1355 (7th Cir. 1983); *Anderson v. Redman,* 480 F. Supp. 830, 832 (D. Del. 1979); *Silverman v. Browning,* 359 F. Supp. 173 (D. Conn. 1972), *aff'd,* 411 U.S. 941 (1973).

To allow the Republicans to escape their responsibility as federal plaintiffs would nullify the abstention doctrine. Abstention always deprives the plaintiff of its choice of forum for its state claims, out of concern for federalism. For this concern to be vindicated, the plaintiff must have an incentive to present those claims promptly and diligently to a state tribunal. If the plaintiff's refusal to prosecute a state lawsuit were grounds to reassert federal jurisdiction, then the requisite incentive would be illusory; federal plaintiffs dissatisfied with an abstention order could defeat it by simple intransigence.

2. The California Supreme Court's Denial, Without Prejudice, of the Republicans' Tardy Petition Is Not a Basis to Retake Jurisdiction.

The Republicans' claim that they have acted affirmatively in state court is based almost wholly on the petition for writ of mandate they filed in the California Supreme Court on September 30, 1983. In the petition, the Republicans demanded that the Court decide the issues presented within an extraordinary one month. The Republicans claim that the petition, and its denial without prejudice, establish

their good-faith pursuit of their claims as well as the "bad faith" of the California Supreme Court in ignoring its duties in an abstention case. The district court, however, found the denial "understandable" and attributable to the Republicans' own foot-dragging.

The Republicans did not petition promptly or diligently. They filed their petition tardily — so tardily, in fact, that according to the Republicans' own timetable, the relief sought would have come too late to affect the 1984 elections. The Republicans had repeatedly said that in order to affect the 1984 elections, any new plan had to be produced, approved and implemented by December 15, 1983. Thus, any decision on the validity of A.B.2X would have to come, they said, by September 15, 1983. Despite this, the Republicans waited until September 30, 1983, fifteen days past their own deadline for a judicial declaration.

When at last they did file, the Republicans insisted on a decision within one month. Though the California Supreme Court has indeed acted with great dispatch in several recent writ proceedings, it has never been asked to act on such an unrealistic timetable nor in so complex a case. In *Legislature v. Reinecke*, 6 Cal. 3d 595 (1972), which the Republicans cite as one of the speediest original writ cases in the California Supreme Court, there were no disputed material issues of fact. The California Supreme Court resolves factual issues only rarely, and then by referring them to a special master. There the Legislature had passed redistricting plans but the Governor had vetoed them, and the major issue was whether to use the vetoed plans or the plans from the previous decade in upcoming elections. Here, the Republicans asked the Court to void the existing plan at a time when no alternative plan existed that could

be rapidly approved and implemented. It is hardly surprising that the Supreme Court cited the Republicans' dilatory behavior in denying their petition:

> Petitioners' delay between June 10, 1983 and September 30, 1983, in seeking relief in this court has foreclosed reference for resolution of the disputed factual claims and disposition after briefing, argument, and preparation of an option by the November 1, 1983 date specified by petitioners.

The Republicans put the California Supreme Court in an untenable position for which the Republicans themselves are responsible, not the court.

The reason the Republicans delayed until September 30 is clear: their federal appeal was pending until September 26, and they hoped for a ruling that abstention was wrong and that they could avoid state court litigation. They argue that they acted promptly enough once their appeal had been decided. Even were this true, it would not excuse their failure to go forward while their appeal was pending. Indeed, their failure to do so casts doubt on their repeated claims that using A.B.2X in the 1984 elections impaired precious voting rights. If they truly cared for these rights, one would expect them to press forward to invalidate A.B.2X in any court they could, rather than wager solely on an improbable appeal. To draw a somewhat fanciful analogy, suppose the Republicans' counsel represented a criminal sentenced to be executed in December, 1983. If the federal court had refused to decide his challenge to his sentence, deferring to a state action in which it found he could challenge it on state law grounds, it would be a surprising strategy to appeal the stay but wholly ignore the availability of relief in the state action. The Republicans' decision to follow essentially the same strategy demonstrates the fixity of their resolution to avoid the state courts.

Attempting to drum up a supposed conflict among the courts of appeal, the Republicans cite *Lister v. Lucey*, 575 F.2d 1325 (7th Cir.), *cert. denied*, 439 U.S. 865 (1978). Following abstention in that case, the federal plaintiffs commenced a state action for damages and declaratory relief. Their state action was dismissed, however, and the dismissal was affirmed by the state Supreme Court because they had failed to follow the procedure for damage suits against the state. They would have had to make a claim to the state legislature before bringing suit, even though another party's claim to the legislature, based on similar facts, had already been denied. The state Supreme Court further held that the declaratory relief claim, which sought a construction of the state law at issue for the guidance of the federal court, was properly dismissed because it related only to the damages claim.

The question as the court of appeals posed it was:

> whether a federal court that orders abstention ... is expected to wait until the federal litigant pursues state non-judicial remedies ... if the state courts refuse to clarify the law until those non-judicial remedies are pursued.

575 F.2d at 1331. This issue is very different from the one presented here. The *Lister* plaintiffs had pursued their state law remedies in good faith, as the court specifically found, through both the state trial and appellate courts, only to be relegated to protracted non-judicial remedies. The Republicans, on the other hand, have actively delayed in the state trial court. The California Supreme Court refused to rule only because the Republicans had made an effective ruling impossible. Far from requiring them to pursue non-judicial remedies, it specifically invited them to renew their petition to it or to the lower state courts.

However, the *Lister* court, although faced with facts far more compelling than any in this case, *refused* to "establish[ ] a general rule" that delay is cause to cease abstention. *Id.* at 1332. It declined to answer the very question it had posed. Rather, it relied on the additional fact that the state law was not so ambiguous as to require abstention. Thus, *Lister* does not control this case.[9] Even straining *Lister* to its utmost, it suggests only that questions of when a federal court should cease an initially valid abstention are too bound up in the facts of individual cases to merit this Court's consideration.

3. Despite the Republicans' Delay, the Superior Court Is Set to Rule in Time for the 1986 Elections, Thus Mooting All Abstention Issues.

That California's Superior Court, like its Supreme Court, has not yet ruled is likewise no basis to retake jurisdiction. First, its seeming inaction was due to the Republicans' own inaction. Courts do not issue rulings unless they are asked to. Second, now that the Republicans have finally asked for a trial date, the Superior Court has set one for May 8, 1985. That trial will moot the present abstention issues, and may also moot the gerrymandering test case the Republicans seek.

As the district court found, the Republicans have failed to litigate the Superior Court action in good faith. Appx. to Pet. at 14a. This conclusion is amply supported by the record. In the critical period following the district court's abstention order, the Republicans *actively delayed* any

[9] The Republicans also rely on *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974). *414* dealt with *Younger*, not *Pullman* abstention. In that case, as in *Lister*, the court of appeals essentially held that abstention had not been proper in the first place. 499 F.2d at 1155. It in no way held that some refusal to act by the state courts had made an originally proper abstention improper. Moreover, the district court had exercised its discretion in favor of retaking jurisdiction, and the court of appeals merely affirmed.

ruling, by demurring to the complaint and moving to change venue. Appx. to Pet. at 13a. As the Superior Court held, the demurrer was unfounded and the venue chosen was proper. Their obstructionist motions having failed, the Republicans ignored the action. They answered the complaint just one day before the Delegation could have taken a default judgment against them.

The Republicans have claimed that the abstention order must be terminated because there is too little time before the 1986 elections to resolve the state law issues. Of course, if the Republicans stall as they have so far, the claim is absolutely correct. However, the question of delay must be judged by what the Republicans could accomplish if they tried. They could have obtained a timely final ruling in state court long ago. Even now, they can obtain one amply before the 1986 elections.

The Superior Court action is one for declaratory relief. As such, it is given priority in trial-setting. Cal. Code Civ. Proc. § 1062.3(a). State law also provides for special trial-setting where a party can show that it needs an earlier trial than it would otherwise be entitled to. Cal. Rules of Ct. 375(b). Rather than use these provisions to obtain prompt relief, the Republicans have preferred to complain about the "congested" and "glacial processes" of the Superior Court. *See* Cert. Pet. at 6, 8. However, after filing their Petition, the Republicans at last availed themselves of these rights. In a motion heard February 8, 1985, they argued that an early trial was needed to avert the use of A.B.2X in the 1986 elections and so to safeguard federal voting rights. They asked for a trial in April or May; they received one on May 8. Clearly, had the Republicans filed a timely answer to the complaint, instead of filing their dilatory motions, and had they moved promptly for an early trial, the trial could have taken place in the fall of 1983.

The Republicans told the lower courts that the average time from at-issue memorandum to trial in the Los Angeles Supreme Court was over four years. Having now obtained a trial date less than four *months* from their at-issue memorandum, they have shifted their attack to the state appellate courts, saying that "the lengthy appeals process in California . . . takes 2 to 3 years." Reply to Resp. to Motn. to Expedite at 2. However, like a trial, an appeal could be had in far less time than the Republicans would suggest. Average figures are irrelevant. There is no reason to assume that the California appellate courts will be less expeditious in examining alleged voting rights cases than the federal courts. It would be an insult to comity to base a decision on such an assumption. If the intermediate appellate courts were to move more slowly than the Republicans desire, there is a simple solution: the California Supreme Court has discretion to hear an appeal directly from a trial court decision, bypassing the intermediate courts. *See generally* 6 B.E. Witkin, *California Procedure,* Appeal § 483. Although it declined to exercise its power to issue an original writ of mandate on a tardy and complex petition in an unprecedented thirty days, the California Supreme Court dismissed without prejudice and invited the Republicans to renew their petition. Thus, the state's highest court has expressed a willingness to hear the case in a timely manner when properly brought before it. It will be all the more likely to accept the case after a trial court has resolved all material factual issues.

The Republicans' hypotheses of delay depend on the additional hypothesis that the district court will renege on its commitment to reassert jurisdiction if the state courts do delay. The district court has undertaken to monitor the state court action, ordering the parties to report to it at monthly intervals. If, despite the Republicans' best efforts, months pass without visible progress, the district court is

plainly prepared to entertain a motion for an early return to federal court. The district court should be commended — certainly not reversed — for thus accommodating the respect for the state courts that comity requires with concern for claims based on voting rights.

III.
CONCLUSION

The district court has shown appropriate respect both for *Pullman* and for the Republicans' invocation of alleged voting rights. It has refused to allow a wholly proper abstention order to be defeated by inaction. Nevertheless, it has shown sensitivity to its duty to prevent harmful delay by insisting on monitoring the progress of the Republicans' claims in state court. There is ample time before the 1986 elections for the Republicans to pursue their state law claims in state court and then if necessary to return to federal court to pursue their federal claims. This Court should deny the petition for certiorari.

Dated: March 6, 1985.

Respectfully submitted,

IRELL & MANELLA
RICHARD H. BOROW, P.C.
*JONATHAN H. STEINBERG
DONNA R. HECHT
Attorneys for Respondents the Members of the California Democratic Congressional Delegation

*Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT E. BADHAM, *et al.*,
Petitioners

v.

THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS TO BRIEFS IN OPPOSITION OF ASSEMBLY OF STATE OF CALIFORNIA AND CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION

ROGER ALLAN MOORE *
E. MARK BRADEN
MICHAEL A. HESS
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

JAMES R. PARRINELLO
MARGUERITE MARY LEONI
NIELSEN, HODGSON,
PARRINELLO & MUELLER
Suite 2650
650 California Street
San Francisco, CA 94108
Attorneys for Petitioners

* Counsel of Record

March 12, 1985

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. An Amicus Brief Filed by One of the Respondents in Another Case Pending in This Court Concedes the Existence of a Conflict	2
II. The Decision Below Is in Conflict With Those of Other Circuits	3
III. The Decision Below Is Wrong	7
IV. Action by the State Court Will Not Moot the Underlying Federal Claim of Gerrymandering	8
V. There Is No Basis For Respondents' Attack on Petitioners' Good Faith	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Assembly v. *Deukmejian*, 30 Cal. 3d 638, 639 P.2d 939 (1982) 5
Baker v. *Carr*, 247 F. Supp. 629 (M.D. Tenn. 1965) 6
Bryant v. *Whitcomb*, 419 F. Supp. 1290 (S.D.Ind. 1970) 6
Cline v. *Robb*, 548 F. Supp. 128 (E.D. Va. 1982) 6
Davis v. *Bandemer*, No. 84-1244, *appeal pending* ..... *passim*
Dodd v. *Barnes*, 279 F. Supp. 291 (E.D. Tenn. 1967) 6
414 Theater Corp. v. *Murphy*, 499 F.2d 1155 (2d Cir. 1974) 4
Griffin v. *School Board*, 377 U.S. 218 (1964) 7
Grivetti v. *Illinois State Electoral Board*, 335 F. Supp. 779 (N.D.Ill. 1971) 6
Ince v. *Rockefeller*, 290 F. Supp. 878 (S.D.N.Y. 1968) 6
Karcher v. *Daggett*, 103 S.Ct. 2653 (1983) 7
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 7
Legislature v. *Reinecke*, 6 Cal. 3d 595, 492 P.2d 385 (1972) 5
Lister v. *Lucey*, 575 F.2d 1325 (7th Cir. 1978) 4
Lucas v. *44th Colorado General Assembly*, 377 U.S. 713 (1964) 8
NAACP v. *Gallion*, 368 U.S. 16 (1961) 4
Railroad Commission v. *Pullman Co.*, 312 U.S. 496 (1941) 2, 8
Ryan v. *State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir. 1981) 8
Warren v. *Government National Mortgage Ass'n*, 443 F.2d 624 (8th Cir. 1971) 9
Wesberry v. *Sanders*, 376 U.S. 1 (1964) 7
Woodard v. *Carteret County*, 252 F. Supp. 268 (E.D.N.C. 1966) 6
Zwickler v. *Koota*, 389 U.S. 241 (1967) 7

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS — Page

U.S. Const., art. I, § 2(1) 7
U.S. Const., art. I, § 2(3) 7
U.S. Const., art. I, § 4 7
U.S. Const., amend. XIV, § 2 7

STATUTES

United States Code

2 U.S.C. §§ 2a-9 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1226

ROBERT E. BADHAM, *et al.*,
Petitioners

v.

THE SECRETARY OF STATE OF THE STATE OF CALIFORNIA, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS TO BRIEFS IN OPPOSITION OF ASSEMBLY OF STATE OF CALIFORNIA AND CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION

INTRODUCTION

The result of more than two years of abstention is that citizens in the nation's largest state have been, and continue to be, deprived of the fundamental right to effective representation in Congress by a sophisticated gerrymander that discriminates against Republican voters and candidates. The respondents that have filed briefs in opposition are the primary beneficiaries (the California Democratic Congressional Delegation) and architects (the California Assembly) of this gerrymander. They argue that certiorari should be denied because there is no conflict of authorities in the lower courts. They neglect to acknowledge in respect of this argument a concession that the Congressional respondents made in a brief amicus curiae filed just three days before they filed their brief in opposition here. In the amicus brief the delegation contrasted

the three-judge court's decision in *Davis* v. *Bandemer*, No. 84-1244, *appeal pending*, with the decision in this case in that the court in *Davis* did *not* abstain from deciding the federal constitutional issue presented by a political gerrymander. The decision below conflicts not only with *Davis*, as the Congressmen have now confirmed, but also with decisions of other courts of appeals. None of the respondents' arguments has merit.

Respondents seek to minimize the importance of this case by suggesting that petitioners' claim is not a substantial *federal* claim. On the contrary, fundamental federal rights are involved in this case, and a facial review of the relevant facts reveals that these fundamental rights are being violated. Clearly, something is amiss in California, and there is ample evidence that a federal judicial inquiry is not only appropriate, but necessary.

ARGUMENT

I. AN AMICUS BRIEF FILED BY ONE OF THE RESPONDENTS IN ANOTHER CASE PENDING IN THIS COURT CONCEDES THE EXISTENCE OF A CONFLICT

On March 4, 1985, three days before filing their brief in opposition here, Congressional respondents lodged a brief amicus curiae in *Davis* v. *Bandemer*, No. 84-1244, which is pending on appeal to this Court from a judgment of a three-judge district court in the Southern District of Indiana invalidating a political gerrymander—by Republicans—of the Indiana legislature. The amicus suggests that this Court should vacate the judgment in the *Davis* case and direct the district court on remand to abstain, under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1964), from decision until state constitutional issues pertaining to the gerrymander are decided. Calif. Cong. Del. Br. Amicus Curiae, No. 84-1244, at 10-12.

The brief in opposition in this case of Congressional respondents, nevertheless, makes the disingenuous assertion that there is no conflict on the abstention issue

among the lower courts. The very opposite assertion is found in their brief amicus curiae in *Davis* v. *Bandemer*, No. 84-1244, *appeal pending*, at 10-12. In urging vacation and remand, the Congressional respondents assert that the *Davis* court improperly failed to abstain from deciding the legality of a partisan gerrymander under the federal constitution when allegedly substantial claims under the Indiana Constitution were available. They cite the court of appeals' affirmance of the district court's abstention orders in this case "[i]n similar circumstances" as an example of what a court should do. Indeed, they go as far as to say, by way of assimilating the abstention issues in the two cases, that the Indiana state constitutional claim in *Davis* "mirrors" one of the state claims in this case. *Id.* at 11.

The conflict with the Indiana decision was pointed out by petitioners in their petition. Cert. Pet. at 6, 14-17. Congressional respondents have now confirmed it in their amicus presentation in the conflicting case while, as parties to this case, denying that there is any conflict of authority on the abstention issue. Cong. Opp. at 10; *see also* Assem .Opp. at 7, 11-17. The respondents cannot have it both ways. Congressional respondents are right in asserting that the court in *Davis* did decline to abstain despite the existence of state law issues. It thereby acted consistently with every other federal court in every Congressional redistricting case save this one in recognizing its duty to decide the federal questions presented, without deferring to state court proceedings of interminable length and uncertain impact. The decision in *Davis* and the decision in this case are in direct, contemporaneous conflict.

II. THE DECISION BELOW IS IN CONFLICT WITH THOSE OF OTHER CIRCUITS

The respondents fail in their efforts to show the absence of a conflict with the decisions in *414 Theater Corp.* v. *Murphy*, 499 F.2d 1155 (2d Cir. 1974), and *Lister* v. *Lucey*, 575 F.2d 1325 (7th Cir. 1978). Their principal

effort to distinguish *414 Theater Corp.* and *Lister* is on the mistaken basis that those circuits "essentially held that abstention had not been proper in the first place." Cong. Opp. at 25, n.9. Respondents' reading of these cases is erroneous. The plain meaning of both *Lister* and *414 Theater Corp.* is that abstention must not continue indefinitely after the state courts have refused an opportunity to decide the state law issues which prompted abstention in the first instance. This is because the state court's refusal to act, even though it knew the federal court was waiting, overcomes any comity considerations. *Lister* at 1332. As stated by the Second Circuit: "Neither comity nor sound judicial administration require the abstaining court to wait indefinitely for state courts to determine the merits. *See NAACP* v. *Gallion*, 368 U.S. 16 (1961)." *414 Theater Corp.* at 1157.

Neither respondent cites any case in which a federal court has continued to abstain from consideration of a claim where a state supreme court has rejected an opportunity to rule on state issues which gave rise to abstention. Absent such authority, respondents are reduced to arguing that petitioners' petition to the California Supreme Court should be ignored as "a hopeless feint at seeking state court adjudication." Cong. Opp. at 10. But, as the petition for certiorari shows, the Supreme Court of California has regularly, and without exception for more than twenty years, exercised original jurisdiction in all other statewide reapportionment cases to render speedy and final decisions. *See* Cert. Pet. and cases referenced therein at 13.

The Congressional respondents argue in this Court that the petitioners' effort to resolve state issues by filing a petition for original writ in the California Supreme Court was not a good faith effort to secure a decision. In the Ninth Circuit, however, when they were arguing in support of the original abstention order, the respondents urged that the California Supreme Court would respond

promptly if petitioners sought an original writ and that the federal courts should defer for that very reason: the prospect of a speedy resolution of state law issues in the state's highest court. They said then:

> ". . . the Republicans could speedily resolve all the state law questions in the California Supreme Court. That resolution would be authoritative and not subject to appeal. The Republicans need merely file an original petition for an extraordinary writ, a procedure of which they are manifestly aware, . . . and which the Congressmen and the Assembly have suggested to them, both in briefs and informally . . . . The California Supreme Court can move with impressive speed in writ matters, and it has a history of rapid disposition of cases dealing with impending elections . . . . Such original writs have become the customary vehicle for resolving California's reapportionment disputes." Congressional Memorandum in Support of Answer to Petition for Mandamus in Court of Appeals for the Ninth Circuit, July 18, 1983, at 33-35.[1]

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[1] There is no merit whatever in respondents' claim in this Court that petitioners must shoulder the blame for the refusal of the California Supreme Court to act. Three assertions, all mistaken, are said to support that contention: 1) that petitioners filed too late to have the state law issues resolved by December 15, 1983: 2) that petitioners wrongfully "insisted" that the state court rule within 30 days; and 3) that the state law issues were too "complex" to be decided expeditiously.

In fact, the mandate petition was filed four days after the Ninth Circuit affirmed the initial abstention order and 75 days before December 15, 1983, the date by which the Secretary of State had said the congressional district lines had to be in place for the 1984 election. *Cf. Legislature* v. *Reinecke*, 6 Cal. 3d 595, 492 P.2d 385 (1972) (Court ruled within 34 days of mandate petition). However, even the Secretary's December 15 date was *not* an immutable deadline. Such deadlines can be, and have been, set back by the court in order to give the court time to rule. *Cf. Assembly* v. *Deukmejian*, 30 Cal. 3d 638, 639 P.2d 939 (1982) (Court set back deadline by not ruling until January 28). It is also untrue that petitioners "in-

Respondents are also wide of the mark in their claim that the decision below to abstain can be squared with the decisions of other federal courts which reviewed congressional redistricting cases after the 1980 census. *See* Cong. Opp. at 14; Assem. Opp. at 15, 16. To this end, respondents cite a string of state and local redistricting cases that, if anything, support petitioners' argument.[2]

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sisted" that the California Supreme Court decide the case in 30 days. Cong. Opp. at 22. Petitioners suggested that the court rule within approximately 30 days, or within such greater time as the court's calendar would allow. Furthermore, the claim that the issues were too complex for the State Supreme Court to decide expeditiously, Cong. Opp. at 22, is directly at odds with the arguments respondents made in 1983 urging the Ninth Circuit to abstain in favor of the California Supreme Court. The argument is also impeached by the characterization Congressional respondents attached to those issues in their own brief to the California Supreme Court in response to the petition for a writ of mandate in October, 1983. In that brief, the issues that are now called "complex" were described as "bizarre and frivolous" (p. 4), "dubious" (p. 7), not meriting "perfunctory mention" (p. 11), and "purely frivolous" (p. 12). Memorandum of California Congressional Delegation re: Issuance of Alternative Writ of Mandate, Oct. 11, 1983, at the pages cited.

[2] *Cline* v. *Robb*, 548 F. Supp. 128 (E.D.Va. 1982) (Court decided federal equal protection claim on the merits and only refrained from deciding a pendent state law claim); *Bryant* v. *Whitcomb*, 419 F. Supp. 1290 (S.D.Ind. 1970) (Court concluded that a city-county redistricting statute was unconstitutional, and declined only to rule on the validity of a severability clause); *Grivetti* v. *Illinois State Electoral Board*, 335 F. Supp. 779 (N.D. Ill. 1971) (Court found a legislative redistricting plan to be constitutional); *Baker* v. *Carr*, 247 F. Supp. 629 (M.D.Tenn. 1965) (Court discussed abstention but ruled on the merits). In the other cases cited by respondents, where federal courts did abstain, the challenged redistricting statutes did not involve congressional districts. *See Dodd* v. *Barnes*, 279 F. Supp. 291 (E.D.Tenn. 1967) (County Board of School Commissioners); *Ince* v. *Rockefeller*, 290 F. Supp. 878 (S.D.N.Y. 1968) (State Assembly Districts); *Woodard* v. *Carteret County*, 252 F. Supp. 268 (E.D.N.C. 1966) (County Commissioners).

III. THE DECISION BELOW IS WRONG

Assembly respondents suggest, without supporting authority or discussion, that the "district court did not abuse its discretion." Assem. Opp. at 17. This case does not, however, involve a mere matter of judicial discretion. The issue is one of law. A vital principle is at stake. The issue is the duty of the federal judiciary when a serious constitutional challenge is raised to a congressional redistricting to rule upon it.[3]

The court below was not presented with mere allegations of wrongdoing. It refused to reassert jurisdiction notwithstanding substantial evidence that the voting rights of millions of Californians were jeopardized by a blatant partisan gerrymander. Contrary to respondents' suggestions, the record below documents the gerrymander with an extensive compilation of expert testimony, depositions, political and statistical analysis, and cartographic exhibits, which made clear the gravity of petitioners' claim that their fundamental rights were being violated. Nevertheless, the district court was not moved.

The conflict between the decision below and *Davis* v. *Bandemer*, *supra*, is over fundamental rights and involves fundamentally different views of the duty of the federal judiciary when serious constitutional issues arise; such issues plainly exist in this case. *Cf. Zwickler* v. *Koota*, 389 U.S. 241, 248, 252-254 (1967); *Griffin* v. *School Board*, 377 U.S. 218, 229 (1964). Perhaps in the sum-

[3] Historically, this Court has always applied a more stringent constitutional analysis to congressional districting cases; i.e., that of Article I, § 2, of the Constitution. *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Karcher* v. *Daggett*, 103 S.Ct. 2653 (1983). Nor is this the only federal constitutional provision applicable to congressional redistricting. *See* Article I, § 2(3); Article I, § 4; and Amendment XIV, § 2. Congress itself has imposed additional constraints on congressional redistricting. *See* 2 U.S.C. §§ 2a-9.

mer of 1983—when respondents were arguing that an expeditious proceeding could be had in the State Supreme Court—there was an arguable basis for thinking that a federal court might have the discretion to wait the three months to learn how pendent state issues would be resolved. The passage of three months at that time would not have caused the 1984 Congressional election to be held in the gerrymandered districts.[4] Once the California Supreme Court refused to act, however, no legal basis for continued abstention remained. *Lucas* v. *44th Colorado General Assembly*, 377 U.S. 713 (1964); *Ryan* v. *State Board of Elections of Illinois*, 661 F.2d 1130 (7th Cir. 1981).[5]

IV. ACTION BY THE STATE COURT WILL NOT MOOT THE UNDERLYING FEDERAL CLAIM OF GERRYMANDERING

Respondents suggest that the setting of a trial date in the state trial court—upon petitioners' motion—renders this action potentially moot. Cong. Opp. at 25; Assem. Opp. at 6. This suggestion begs the question of whether continuing abstention was proper after the California Supreme Court refused to rule. A ruling against re-

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[4] Contrary to the implications of the Congressional respondents, petitioners never conceded that it was too late for the district court to reassert its jurisdiction and rule on their gerrymander claim in December of 1983. Cong. Opp. at 8. This was a factual error in the district court's June 19, 1984, Memorandum Opinion which is not borne out in any transcript and which petitioners corrected in their emergency petition to the Ninth Circuit. Emergency Petition for Writ of Mandate, filed June 23, 1984, at p. 23, n.2.

[5] Assembly respondents wrongly suggest that petitioners' reference to *Ryan*, *supra*, is distorted. Assem. Opp. at 11. While the court of appeals did state that "only a three-judge panel could make [a] determination" on the question of abstention in a redistricting case, 661 F.2d at 1135, the court nonetheless concluded that *Pullman*-type abstention was inapplicable because no state grounds existed in the case. *Id.* at 1136. Petitioners correctly noted that once the motion for leave to file the second amended complaint in this case was granted, a state court could no longer render the federal claims moot. Cert. Pet. at 15.

spondents from the Los Angeles Superior Court on the abandoned state law issues would undoubteldy be appealed since no party has stipulated away that right. Equal exercise of voting rights should not depend on speculation that the California Court of Appeal and Supreme Court will expedite their process, Cong. Opp. at 27, especially after the California Supreme Court has once declined to do so. Furthermore, the state law issues are not dispositive of the partisan gerrymandering claim, and a decision on those issues will not obviate the federal issue of whether a partisan gerrymander is constitutional. *See* dissent of Judge Schnacke, Cert. Pet. at 18a.

V. THERE IS NO BASIS FOR RESPONDENTS' ATTACK ON PETITIONERS' GOOD FAITH

There is no foundation for respondents' repeated assertion that petitioners have acted in bad faith and have not sought a speedy resolution of the state law issues in this case.[6] As we have seen, it was the Congressional respondents who told the Ninth Circuit that the California Supreme Court would give the petitioners a rapid and authoritative adjudication of the state law issues. The petitioners sought such relief but were denied.

It is not petitioners who have reason to delay the litigation. Petitioners seek to change the status quo; re-

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[6] Congressional respondents wrongly assert that there is clear authority for the proposition that the federal court plaintiffs have a unilateral duty to prosecute a state court action once abstention is ordered. Cong. Opp. at 20, 21. In *Warren* v. *Government National Mortgage Ass'n*, 443 F.2d 624 (8th Cir. 1971), a district court abstained in a foreclosure action, and was affirmed on appeal, because plaintiff had agreed at the pre-trial conference to file a state court action which admittedly provided appropriate remedies. The court of appeals' directions to the plaintiff in *dicta* have been taken out of context by respondents. Neither this case, nor *dicta* in the others cited by respondents, creates a "rule of law" that plaintiffs have a burden of going forward in state court. In any event, petitioners did go forward—to the California Supreme Court—and were turned away.

spondents want to preserve it. Petitioners gain nothing by delay, and have sought to avoid it. Petitioners sought the speediest state court remedy available to them—an original writ in the California Supreme Court—and relief was denied. As Judge Schnacke wrote in his dissent from the district court's decision to continue to abstain, this "is sufficient to overcome any comity consideration and justifies the reassertion of federal jurisdiction." Cert. Pet. at 19a.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ROGER ALLAN MOORE *
E. MARK BRADEN
MICHAEL A. HESS
310 First Street, S.E.
Washington, D.C. 20003
(202) 863-8638

JAMES R. PARRINELLO
MARGUERITE MARY LEONI
NIELSEN, HODGSON,
PARRINELLO & MUELLER
Suite 2650
650 California Street
San Francisco, CA 94108
Attorneys for Petitioners

* Counsel of Record

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